MODERN THEORIES OF LAW

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PREFACE

THIS book contains the text of ten public lectures delivered at the London School of Economics and Political Science during the Lent and Summer Terms of 1932. English law is so complex and technical that the Law Faculties have been compelled to emphasize technique at the expense of the broader problems which underly the modern legal systems. But since legal theory is common to jurisprudence, political science, and sociology, several members of the staff of the London School of Economics have been compelled to devote considerable attention to it, and it appeared to some of us that in the absence of an adequate literature on modern legal theory a course of public lectures would make available to students of the Faculty of Law of the University of London some of the ideas which the legal philosophers have expounded in recent years. We found that, though we could obtain an adequate course from members of the staff of the School alone, the series would be greatly improved if we could secure the help of two lecturers from outside. Sir William Beveridge, Director of the School, very kindly gave us permission to invite Sir Maurice Amos and Professor A. L. Goodhart; and the reader of this book will have no difficulty in ascertaining that these distinguished friends of the School immensely enriched the course.

The lectures were so successful in stimulating interest in the University that we offer them to a wider public, in the belief that they form an introduction to modern legal theory which others may want to read. They naturally have both the advantages and the defects of a course of lectures. On the one hand they are, I think, readable—no mean merit in a book on so difficult a subject—and in a short space they cover a wide field—another merit in a subject which lends itself to prolixity. On the other hand, each lecturer was left to develop his subject in his own way, and there is an evident lack of system. Also, no

attempt has been made to arrange the essays in their logical order (if there is a logical order), but since each is independent of the rest the reader may peruse them in any order which appears to him to be the most convenient.

It is my pleasant duty not only to thank on behalf of the School the two lecturers who came to us from outside, but also to thank on behalf of the Law Department the members of other Departments who came to demonstrate to us the unity of the social sciences. Our thanks are due particularly to Professor Morris Ginsberg, who originally suggested the course, and to Professor H. J. Laski, who had most to do with its elaboration.

W. IVOR JENNINGS

LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE
(UNIVERSITY OF LONDON)
March 20, 1933

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SOME AMERICAN INTERPRETATIONS OF LAW

By A. L. GOODHART

A PHILOSOPHER, however pure and abstract his theories may be, is to some degree affected by the conditions and circumstances of the times in which he lives. As Hegel has said: 'Es kann niemand seine Zeit überspringen: der Geist seiner Zeit ist auch sein Geist. . . . Es ist eben so thöricht, zu wähnen, irgend eine Philosophie gehe über die gegenwärtige Welt hinaus, als ein Individuum überspringe seine Zeit, springe über Rhodus hinaus.' This influence of time and place is particularly strong in the case of legal philosophers, for they necessarily are dealing with matters which intimately concern contemporary life. Dean Pound in his book *Interpretations of Legal History* has shown in his analysis of the legal philosophies of the past that each one of them is primarily an attempt to formulate in general terms the ideals and purposes of law at a particular period. The philosopher turns to the legal system with which he is familiar; to the German the rules of Roman law supply the basis for an elaborate structure of fundamental legal principles, while the Englishman finds in the common law the natural rights to which every man is heir. Therefore, if we are to understand contemporary American legal philosophy, it is necessary for us to consider the facts which, perhaps unconsciously, have brought that philosophy into being. These may explain why American writers in their definitions of law place the emphasis in almost all cases on the judge and the judicial process while, on the other hand, this approach to the problem is not followed in the continental theories. Thus in the collection of French definitions which Professor Henri Lévy-Ullmann has given in his book *La Définition du droit*[1] we do not find a single reference to the judiciary as the essential source of law. So marked a difference can

[1] *Éléments d'introduction générale à l'étude des sciences juridiques*, 1917.

only be explained on the ground that the various jurists, while purporting to define law in general terms, are in fact describing the systems which are applied in their respective countries.

I believe that the American practice of emphasizing the importance of the judge is due primarily to the following four influences which we do not find equally marked in other countries:

(1) The theory that law is the command of the supreme legislature has never appealed to the American legal philosopher, for there is no single body in the United States whose commands are ultimate and universal. Austin attempted to find his American sovereign in that body which could amend the Constitution, but his view has not been accepted by a single American jurist of note. The peculiar contribution which the United States has made to political science is the discovery that there can be, within the same territory, two supreme governments functioning within their own spheres. The legislatures of both the Federal and the State governments have the power to command, but the power of the one is necessarily limited by the power of the other, and in disputed questions it is for the Courts to decide which government has the right to act. The idea that law must be ultimately referable to a single legislative authority in the State is therefore foreign to American thought. But the command theory of law dies hard, and as soon as one commander disappears another springs up in his place. The legislative sovereign having been killed in the United States, the legal sovereign succeeds to his throne. Law is no longer what the supreme legislature commands but is now what the supreme judge does. *Le roi est mort, vive le juge!*

(2) If the function of the United States Supreme Court had been limited merely to acting as an arbiter between the Federal and the State governments it is hardly probable that it would have assumed the stellar role in the American legal drama, but the Constitution has been interpreted as conferring far wider powers upon the Court. In particular,

the Fourteenth Amendment, which provides that 'no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws', has made the Court a censor of all state legislation. In England 'due process of law' means in accordance with law duly enacted or established, but in America the phrase has given rise to a new and formidable principle under which any legislation unreasonably interfering with the natural right to freedom of contract or of calling, and of property in the widest sense, is held to be invalid. Professor Haines has termed this 'the modern revival of natural law ideas in American constitutional law'.[1] It is obvious that this doctrine places a peculiar emphasis upon the power of the judges, and that it, therefore, must influence the attitude of the American jurist in his approach to the law. If the House of Lords could refuse to follow a statute enacted by the King in Parliament, on the ground that it was unreasonable, the current English conception of law would necessarily be affected thereby.

(3) Professor Williston has recently said that 'each State is developing a jurisprudence of its own which tends to become more and more independent of the law of other States'.[2] Thus in some States a third party beneficiary may sue on a contract while in others he cannot, and in some States the rule in *Rylands* v. *Fletcher* is followed while in others it has not been accepted. The American lawyer is, therefore, less inclined to think of the common law as based on a limited number of fixed principles necessarily leading to certain results than is the English lawyer who deals with a single system which is a more or less coherent and logical whole. The part played by the judges in making law is, therefore, emphasized in the United States, for if the results reached in the various States conflict, this must be due to a difference in the interpretation placed upon the general principles by the judges. I am not suggesting that

[1] Charles Grove Haines, *The Revival of Natural Law Concepts*, 1930.

[2] Samuel Williston, *Some Modern Tendencies in the Law*, 1929, at p. 73.

the English lawyer does not realize that the judges do and must create new law, but the extent of this process is less marked when the judgements of only one jurisdiction are under consideration.

(4) In England the deliberate and conscious creation of law by the Courts has never been thought of as a primary function of the judicial process, but as Dean Pound has shown in the chapter on 'The Pioneers and the Law' in his book *The Spirit of the Common Law*, the chief problem of the formative period of the American legal system was to discover and lay down rules.

'Above all else we sought to insure an efficient machine for the development of law by judicial decision. For a time this was the chief function of our highest courts. For a time it was meet that John Doe suffer for the commonwealth's sake. Often it was less important to decide the particular cause justly than to work out a sound and just rule for the future. Hence for a century the chief energies of our courts were turned toward the development of our case law and the judicial hierarchy was set up with this purpose in view.'[1]

This conscious creation of law by the judges was inevitable, for the less certain the law is, the greater will be the need for judicial legislation. In America the common law had to be adapted and fitted to new conditions, and this was a work which only the judges could do. The legislative function of the Courts was, therefore, marked to an unusual degree.

The influence of each of these four distinctive features of American law which I have discussed is the same in each case—to put peculiar emphasis on the judge and on his creative power. It is not surprising, therefore, to find that this is mirrored in most American definitions of law, and that, whatever difference there may be between them in detail, the judge is always used as the focal point. With this in mind we can now consider some of the more important recent theories.

From the English standpoint, Professor Gray's definition

[1] p. 120.

of law in his book *The Nature and Sources of the Law* is perhaps the best known, as having been followed in large part by Sir John Salmond in his *Jurisprudence*. 'The Law of the State or of any organized body of men', he says, 'is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties.'[1] He denies that a statute is law until it has been interpreted by the Courts, for 'the courts put life into the dead words of the statute'. It is in the judge that we find our Austinian sovereign, for in Bishop Hoadly's words, which Gray quotes twice to mark their importance: 'Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the person who first wrote and spoke them.' Nor does Gray hesitate to carry his definition to its full logical extent, as he acknowledges that according to his view, 'The Law of a great nation means the opinions of half-a-dozen old gentlemen', for 'if those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in that country.'[2]

So strange a result makes one wonder whether there is not a logical fallacy in Gray's persuasive argument. Is his major premise that judges have 'an absolute authority' correct? Is it an authority which exists in fact or only in theory? From the standpoint of fact it is obvious that a deliberate attempt by the judges to reject a clearly worded statute would lead to impeachment or revolution. In answer to this, the argument is frequently advanced in support of Gray's view that the Courts can always by misinterpretation avoid a statute, but is this true? If the statute declares that only a written will is valid, by what process of misinterpretation can the Courts hold that an oral will is binding? If Gray is correct, then his definition destroys all law, for if the judges are not bound by a prior statute, neither can they be bound by a prior precedent.

[1] p. 82. [2] p. 82.

Mr. Justice Cardozo has pointed out the fallacy in the view that real law is not found anywhere except in the judgement of a Court: 'In that view, even past decisions are not law. The Courts may overrule them. . . . Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules or principles: there are only isolated dooms.' [1]

As Gray's definition contains this seed 'of fallacy and error' there are two possible views to be taken of it; either that it is too radical in saying that statutes do not constitute law, or that it is not radical enough because of its implication that law can be found in the judgements of the Courts. Mr. Justice Cardozo is an example of the first school of thought, while some of the modern realists illustrate the more advanced point of view.

Nothing in Mr. Justice Cardozo's legal philosophy need shock the English lawyer, for his approach to the law is along traditional lines. Thus he insists that the judges are bound by statutes and, in so far as these are clear, there is no place for judicial legislation. Even in cases of doubt, judicial interpretation of statutes lacks 'some of that element of mystery which accompanies creative energy'.[2] Again, in the case of precedent, the judge is bound by those which are clearly in point:

'*Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute.'[3]

These precedents which plainly fit are not the exception but the rule, for:

'In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the land-

[1] *The Nature of the Judicial Process*, Yale University Press, 1921, at p. 126. [2] Ibid., at p. 18. [3] Ibid., at p. 20.

scape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.'[1]

But precedents which plainly fit do not exist in all cases, and then the creative power of the judge must be exercised in choosing which among the various possible competing principles he will follow. This may prove difficult, for when the judge reaches the cross-roads he may find four separate paths:

'The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.'[2]

Mr. Justice Cardozo's brilliant analysis of these different forces has proved of the greatest value in emphasizing the degree of conscious choice with which a judge is faced in deciding a doubtful case, but he is far from saying that there is this choice in all or even in the majority of cases.

As I have said, the realist school has taken the other view that Gray's definition of law is not sufficiently radical. Thus Jerome Frank in his well-known book, *Law and the Modern Mind*, says that, '*But*, for all his terse directness, you will detect more than a trace of the old philosophy in Gray's views'.[3] And later in speaking of Gray's judge-made law he adds: 'Those rules are no more law than statutes are law. For, after all, rules are merely words, and those words can get into action only through decisions; it is for the courts in deciding any case to say what the rules mean, whether those rules are embodied in a statute or in the opinion of some other court.'[4] But what is law if it can be found neither in statutes nor in precedents? Law, according to this view, seems to be merely the decision in

[1] Ibid., at p. 129.
[2] Ibid., at p. 30.
[3] p. 122.
[4] p. 125.

each case. 'For any particular lay person', says Frank, 'the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.'[1] A similar view is expressed by Professor Llewellyn in his lively book, *The Bramble Bush*: 'This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*'[2]

Under this definition, rules are merely a source of law. Thus Frank says: 'Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them.'[3] According to this view favouritism and prejudice must also be added as sources of law for they, too, may influence a decision. The result to which this novel doctrine leads has been ably criticized by Professor Dickinson:

'For example, it may become desirable to keep distinct for purposes of discussion the fact of Judge *A*'s known animosity to Lawyer *X*, and the fact that there is a rule of law which in a given instance the judge's animosity led him to disregard. If both the animosity and the rule are equally "law", it becomes difficult to state the situation in appropriate terms, or to find any proper standard for criticising the behavior of the judge.'[4]

[1] p. 46.
[2] Columbia University School of Law, 1930, at p. 3.
[3] Op. cit., at p. 127.
[4] *Legal Rules*, reprinted from *University of Pennsylvania Law Review*, 1931, at p. 6.

To a distant spectator of the conflict the advantage seems to be on the side of Professor Dickinson. The realist school in their preoccupation with the administration of justice, a subject of peculiar importance to American lawyers at the present time, seem to have combined in a single term 'law' this administration of justice with the rules of law themselves. Is this confusion of two distinct concepts a desirable one? From one standpoint it may have favourable results, for it emphasizes the close relationship between the two, a relationship which has too often been forgotten. But from the standpoint of clear thinking this confusion seems undesirable. As Dean Pound has said:

'Such a view is not without its use as a protest against the assumption that law is nothing but a simple aggregate of rules. But nothing would be more unreal—in the sense of at variance with what is significant for a highly specialized form of social control through politically organized society—than to conceive of the administration of justice, or the legal adjustment of relations, or, for that matter, the working out of devices for the more efficient functioning of business in a legally ordered society, as a mere aggregate of single determinations.'[1]

It is doubtful whether the realist school would have attained quite the importance which it now holds in American legal thought if it could not have claimed to find support for its views in the writings of Mr. Justice Holmes. His famous definition 'the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by Law' is the corner-stone of their doctrine. This definition has had such great influence on juristic thinking that it may be of value to see for what purpose it was framed. It is found in the essay 'The Path of the Law'[2] in which Mr. Justice Holmes was primarily concerned in distinguishing between legal and moral ideas and in drawing a definite line between law and ethics. 'You will find', he says, 'some text writers telling you that it (law) is something different from what is decided by the courts of

[1] 'The Call for a Realist Jurisprudence' (1931), xliv *Harvard L.R.* at pp. 707, 708.

[2] *Collected Legal Papers*, 1920.

Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not.'[1] He points out that the man in court 'does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact'.[2] Then follows the famous definition. It is obvious, unless we separate the words from their context, that Mr. Justice Holmes was not attempting a complete philosophical analysis of the term 'law', but was merely using his definition for a limited purpose. 'Law is what courts do' is an adequate test by which to distinguish law from ethics, but as a complete answer to a question which has exercised philosophers and jurists from Plato to the present day it hardly seems conclusive.[3] 'Medicine is what the doctor gives you' is a sufficient definition for most laymen, but will it satisfy a doctor? It is strange that the realists have used Mr. Justice Holmes's aphorism without any reference to the context in which it is found, for one of the fundamental tenets of their faith is that phrases are dangerous and misleading when separated from the circumstances in which they are used.

The realist school depends for its importance, however, not upon any definition of law, but upon the emphasis it places on certain features in law and its administration. These are, of course, not equally stressed by all the realists,

[1] At p. 172. [2] At p. 173.

[3] Professor Dickinson's criticism of the view that law is a prophecy is of particular interest. He says (*Legal Rules*, pp. 11, 12): 'The view that law is a prophecy of what will be decided has the weakness of emphasizing exclusively the outside spectator's point of view—and consequently of ignoring the point of view of the judge through whose active agency the future is to be transmuted into fact. It is submitted that the sound way to anticipate a future decision is to attempt to put oneself in the place of the judge who will actually make the decision. The judge will find himself confronted with one or more legal rules applicable or conceivably applicable to the case before him. For him these rules cannot be conceived as mere rules of prediction. He is not interested in predicting what he himself is about to do. The standpoint of prediction is that of the observer; the judge's attitude towards the rule is that it is a guide or mandate for action.'

for they deny that they are a school in the sense of having certain fixed doctrines, but there are a number of major tendencies which are sufficiently marked to enable us to attribute them to this school of thought.

Perhaps, from the English standpoint, the most striking feature of this school is the stress they place upon the uncertainty of law, an approach which necessarily follows from their interpretation of law as a series of single decisions. This view has been greatly influenced by recent developments in physical science for, with doubtful justification, they argue from the relativity of Einstein to the relativity of law. Here again I quote from Frank's book:

'In fields other than the law there is to-day a willingness to accept probabilities and to forgo the hope of finding the absolutely certain. Even in physics and chemistry, where a high degree of quantitative exactness is possible, modern leaders of thought are recognizing that finality and ultimate precision are not to be attained. The physicists, indeed, have just announced the Principle of Uncertainty or Indeterminacy. If there can be nothing like complete definiteness in the natural sciences, it is surely absurd to expect to realize even approximate certainty and predictability in law, dealing as it does with the vagaries of complicated human adjustments.'[1]

Whether this analogy between law and science is sound, I doubt. Certainly the scientists themselves reject it. Thus Karl Pearson in *The Grammar of Science* says:[2]

'The civil law involves a command and a duty; the scientific law is a description, not a prescription. The civil law is valid only for a special community at a special time; the scientific law is valid for all normal human beings, and is unchangeable so long as their perceptive faculties remain at the same stage of development.'

As Professor Adler has shown,[3] the analogy between law

[1] 'Law and the Modern Mind', p. 7. [2] 1911, 3rd ed., at p. 87.

[3] Mortimer J. Adler, 'Law and the Modern Mind' (1931), xxxi *Col. L.R.* 91, 103: 'The distinction to be made is between "law as official action" and "law in discourse"; "law" in the first instance is a term which designates all of the actual processes which take place in time, the prosecution of litigation, the advisory work of the law office, the

and science is only true when we are considering sociological and psychological phenomena, such as the thought-processes of a judge. But it is inapplicable when we are considering the rules which are the result of this process. The conscious and unconscious thought-processes of a judge in making a decision are obviously as much a problem in psychology, and therefore of natural science, as are the thought-processes which induce an artist to paint a picture. But when the decision and the picture have been made then we no longer consider the behaviour of the judge and of the artist but are now concerned with the result of that behaviour. In analysing and valuing this result the methods of natural science are no more applicable to law than they are to art.

The second feature of the realist school is its attack on the use of formal logic in law, which they term 'medieval scholasticism'. Thus in their introduction to M. Rueff's book *From the Physical to the Social Sciences*,[1] Professors Oliphant and Hewitt demonstrate that where there are conflicting analogies, logic will not give us an answer to the essential question, which analogy is to be followed? The Court can decide one way or the other, and in either case can make its reasoning appear equally flawless. The 'transcendental' approach to law, as they term it, which suggests that a 'correct' determination of all questions can always be found if only the judge is sufficiently logical is

judicial administration of disputes, and so forth; "law" in the second instance is an academic subject-matter, a body of propositions having certain formal relations capable of analysis. There is no reason why there should not be a science of law in both of these two senses of the term, but the two sciences are quite different things, and all the trouble comes from confusing them.'

[1] In the prefatory note to this book, published by the Institute for the study of Law of the Johns Hopkins University, it is said that it will prove of 'great value in the current and widespread discussion of the development of the scientific habit of thought and of the logic and philosophy underlying scientific methods'. Professor Morris R. Cohen, one of the most distinguished philosophers in America to-day, in reviewing this book in the (1931) xliv *Harvard L.R.* 1149, said: 'Not only has M. Rueff no direct familiarity with the field of natural science, but his knowledge of scientific logic is of the remotest hearsay.'

therefore wrong. It is difficult to find an example of this 'transcendental' view in modern legal literature, but it may be illustrated by the following quotation from Blackstone which is the most recent one I have been able to discover: 'The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact.'[1] In attacking this view the conclusion which Oliphant and Hewitt reach is obviously a correct one, and the only doubt we have is whether it was necessary to devote twenty pages in demonstrating what has become a truism, accepted by legal scholars for one hundred and fifty years. In 1782 Archdeacon Paley published his *Moral and Political Philosophy*, and in book vi, c. viii, he gives an account of 'The Causes of the Numerous Uncertainties and Difficulties Arising in the Administration of Justice'. He points out that a considerable number of legal controversies are due to *'the competition of opposite analogies'*, and he shows by an illustration, not unlike that used by Oliphant and Hewitt, that, in such cases, conflicting conclusions can be reached without a violation of logic. Fifty years later in 1832, Austin in his lectures on jurisprudence[2] discussed at length the views expressed by Paley and Sir Samuel Romilly concerning the competition of opposite analogies both in statute and in case law, and emphasized the error of Blackstone's 'transcendental' attitude towards law. It

[1] 3 Blackstone Commentaries 396.

[2] *Lectures On Jurisprudence*, 5th ed., 1911, vol. ii, pp. 638–41: 'Now where the judge makes a judiciary rule, he may build it on any of various grounds, or derive it from any of various sources: e.g. a custom not having force of law, but obtaining throughout the community, or in some class of it; a maxim of international law; his own views of what law ought to be (be the standard which he assumes, general utility or any other).

'But it often (perhaps most commonly) happens, that he derives the new rule, by a consequence built on analogy, from a rule or rules actually part of the system. And it is to the creation of law thus derived from pre-existing law that the competition of opposite analogies to which judicial legislation is liable is peculiarly, if not exclusively, incident.'

seems strange to find that, after a hundred years, the realists should be making the same point with all the enthusiasm of discoverers of a new truth.

But even if formal logic will not give us the correct answer where there is a competition of opposite analogies this is no reason for rejecting it as medieval scholasticism. In the first place even in those cases in which there is a conflict it is seldom that the opposing principles fit the same set of facts with the same degree of appropriateness, and secondly, as Professor Cohen has said, 'The justification of juristic logic and technique in terms of principles is that they help us to make the analogy explicit and thus make possible the criticism necessary to make a legal system liberal and progressive.'[1]

A more novel attack on the importance of logic in law is found in the doctrine that the judge in deciding a case reaches his decision on 'emotive' rather than on logical grounds. It follows that general principles, based on logic, are only of slight importance in the administration of justice. As I understand it, this is the view of Professor Yntema:

'Of the many things which have been said of the mystery of the judicial process the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part. The function of juristic logic and the principles which it employs seem to be like that of language, to describe the event which has already transpired. These considerations must reveal to us the impotence of general principles to control decision. Vague because of their generality, they mean nothing save what they suggest in the organized experience of one who thinks them, and because of their vagueness, they only remotely compel the organization of that experience.'[2]

A similar view is expressed by Professor Cook when he says that 'no competent psychologist to-day believes that the reasons that men give for their conduct are an adequate

[1] (1931) xliv *Harvard L. R.* 1153.
[2] (1928) xxxvii *Yale L. J.* 468, 480.

account of their real reasons for doing what they do'.[1] But unless we assume that judges do act in accordance with logic what is the value of studying past judgements? Is the whole great body of our reports on which the common law is founded based on a fundamental error? Yes, according to Professor Oliphant, for 'not the judges' opinions, but which way they decide cases, will be the dominant subject matter of any truly scientific study of law'.[2] If we cannot agree with this conclusion, we may at least admire the courage of a school which sweeps aside in so categorical a manner the practice and learning of six centuries. But if logic is to be rejected and each case is to be regarded as the result of 'an emotive experience', what basis is there even for prediction? Because Judge A has felt a certain emotion when faced with an undated negotiable instrument, is there any reason to suppose that Judge B will necessarily feel the same emotion under similar circumstances, or, even if the same emotion is felt, that it will lead to an identical conclusion? This 'emotive' theory is, of course, the negation of all rational legal rules, for as Professor Buckland has said, 'If the rule is not based on principle, we must not base a principle on it'.[3]

From the quotations I have already given it is clear that a third feature of the realist school is the great weight they place on modern psychology, with a strong leaning towards behaviourism. Of course the attempt to relate psychology and law is not original with the realist school—the work of the late Professor Münsterberg of Harvard in criminal evidence is well known—but the emphasis placed on it is unusual. Some of the results attained by lawyers in the dangerous field of legal psychology are both interesting and surprising. Thus Frank attributes the infantile belief in the authority of rules, which is held by such distinguished jurists as Mr. Justice Cardozo and Dean Pound, to a

[1] (1932) xlv *Harvard L. R.* 1126.

[2] 'A Return to *Stare Decisis*', *American Bar Association Journal*, 1927, vol. xiv, p. 71.

[3] *The Main Institutions of Roman Private Law*, 1931, p. 106.

father complex which finds satisfaction in the idea of law:

'The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge.'[1]

But though we may disagree with Mr. Frank's conclusions, his method of explaining legal doctrines on psychological grounds is a most interesting one. It may lead to startling and unexpected results; thus a careful reading of Dr. Alfred Adler's *The Neurotic Constitution*[2] seems to prove—although we are not suggesting that this is our belief—that the doctrines of the realist school itself are due to an inferiority complex. During the past thirty years law, and particularly the administration of law, has been under continual attack in the United States while, on the other hand, the belief in the efficacy of natural science has become almost a religion. Does not this explain why some teachers of law have been attempting to identify law and natural science, just as the extreme neurotic case attempts to identify himself with Napoleon? Again, Dr. Adler says, 'At the onset of the development of a neurosis there stands threateningly the feeling of uncertainty.'[3] This feeling of uncertainty is continually stressed by the realist school—for that matter, it may be said to be its primary doctrine—in its references to the rules of law. This sensation of doubt 'demands insistently a guiding, assuring and tranquilizing positing of a goal in order to render life bearable. Among these are especially prominent safety devices and fictions in thought, action and volition.'[4]

[1] 'Law and the Modern Mind', p. 18.

[2] Vienna. Translation by Bernard Glück, M.D., and John E. Lind, M.D., New York, 1917.

[3] p. xii.

[4] p. xii.

The realist school finds its safety device in a belief that 'scientific method' will solve our legal difficulties, though in what this scientific method consists there seems to be considerable doubt. How is it possible, for example, to apply the experimental method of physics to the study of law, and is the behaviour of judges really comparable to the behaviour of electrons and atoms, as Professor Cook suggests?[1] To quote again from Dr. Adler, 'The neurotic carries his feeling of inferiority constantly with him. Hence his method of thinking by analogy is more strongly and clearly developed.'[2] In the citations already given it is clear that the use of analogies, especially to physics, is one of the marked characteristics of this school. One final quotation will suffice: 'In neurotic students I have sometimes observed that led by the feeling of their predestination scholars have sought a hearing on subjects with which they were wholly unfamiliar with the result of total failure.'[3] Thus excellent lawyers are sometimes induced to express views on physics, mathematics, philosophy, sociology, and psychology which experts on those subjects seem to regard with surprise. It would be possible to continue these illuminating quotations at great length, but perhaps enough has been said to explain the emotive processes of the realist school on psychological grounds.

[1] (1924) xxxiii *Yale L. J.* 457, 475. Professor Cook says: 'We as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms or planets, however, we are dealing with the behavior of human beings. As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behavior in the future. Our statements of the "law" of a given country are therefore "true" if they accurately and as simply as possible describe the past behavior and predict the future behavior of these societal agents.'

This odd comparison between the unconscious movements of electrons and the conscious volitional decisions of a judge may be contrasted with the following quotation from Professor Morris R. Cohen's article 'Mr. Justice Holmes and the Nature of Law', (1931) xxxi *Col. L. R.* 352, 366: 'It seems rather obvious that the decision will depend not on facts as objective as physical stimuli, but rather on what the judge thinks are the facts and what law he thinks applicable.'

[2] p. 18.

[3] p. 88.

A fourth feature of the realist school is the attack they have made on the value of legal terminology, for, according to them, these terms are a convenient method of hiding the uncertainty of our law. Thus Professor Green protests against 'the part which sacred words, taboo words, magic words, continue to play in our law',[1] and he argues that, 'under whatever guise it has been undertaken, the search for a language technic which would solve the difficulties of government has been the falsest hope of legal scholarship. No natural or social science has found its secrets in words and phrases and neither will the science of law.'[2] Here again the dangerous analogy between law and natural science is used as an argument, but in so far as it is true it would seem to lead to a conclusion exactly opposite to that intended by Professor Green. Of course natural science has not found its secrets in words, for the tools which a natural scientist uses are not verbal. But every scientist insists that the value of his work depends upon the accuracy of his instruments. Now the instruments with which a lawyer works are words, and therefore, although it is not difficult to conceive of a wordless scientist speaking through his experiments and his symbols, a wordless lawyer is an impossibility. As Hohfeld has shown,[3] it is only by a careful analysis of our words that accuracy in legal thought can be attained. The search for a language technique is therefore the essence of legal scholarship just as the search for instrumental technique is the essence of every natural science. It is, of course, obvious that instruments will not by themselves solve problems, but, on the other hand, problems cannot be solved without adequate instruments, and for the lawyer these are found in words.

Finally, the realists stress 'an evaluation of any part of law in terms of its effects, and an insistence on the worth-

[1] Professor Leon Green, 'The Duty Problem in Negligence Cases', (1928) xxviii *Col. L. R.* 1014, 1016.

[2] Ibid., p. 1018.

[3] *Fundamental Legal Conceptions*, 1923.

whileness of trying to find these effects'.[1] This is an admirable aim, although here again the novelty is perhaps less marked than the enthusiasm. As 1932 is the centenary of Bentham's death, a reference to that great jurist may not be out of place. He, too, stressed the need for a practical reconsideration of the law along scientific lines. In writing of his book *The Introduction to the Principles of Morals and Legislation*, he said:

'The present work as well as any other work of mine that has been or will be published on the subject of legislation or any other branch of moral science, is an attempt to extend the experimental method of reasoning from the physical branch to the moral. What Bacon was to the physical world, Helvetius was to the moral. The moral world has therefore had its Bacon, but its Newton is yet to come.'[2]

It was perhaps false modesty which prevented Bentham from asserting a claim to being the legal Newton. Now that Newton has been eclipsed by Einstein, we may hope that Bentham will be improved upon by the modern realists. The major difference between them seems to be that Bentham relied on the doctrine of utility by which to measure the efficacy of law, while the realists pin their faith to the vaguer, but therefore more impressive, doctrine of scientific method. It is unfair to suggest that their method has not produced anything comparable to the great practical results which followed on the work of Bentham, for, up to the present time, they have been concerned primarily in developing a technique. Whether this new technique will prove of greater value than the old is a question which only time can answer. But even if in a hundred years 'scientific method' will have proved itself as doubtful a guide as utility, nevertheless the work of the new school will probably have left its mark on the law. No one can read the many essays on this subject without realizing that the energy and enthusiasm of the realists

[1] K. N. Llewellyn, 'Some Realism About Realism', (1931) xliv *Harvard L. R.* 1222, 1236.

[2] Everett, *The Education of Jeremy Bentham*, 1931, at p. 36.

must influence the development of legal thought in the coming generation, and that in so far as this furthers legal reform it is wholly admirable. But there is a danger that the over-emphasis on the uncertainty of law may lead to juristic pessimism on the part of the students, and, what is even more dangerous, that it will induce an emotional rather than a rational approach to legal problems. After all, the whole question is one of emphasis, and depends entirely upon which aspect in the administration of justice we desire to stress. As Dean Pound has said:

'As in the disputes of diverse schools of jurists in the past, the difference today is one of emphasis. Received ideals, conceptions, the quest for certainty and uniformity, an authoritative technique of using authoritative legal materials, settled legal doctrines and modes of thought, and a traditional mode of legal reasoning are actual and everyday phenomena of the legal order. The question at bottom is whether a faithful representation of realities shall paint them in the foreground or instead shall put in the foreground the subjective features in the behavior of particular judges, the elements in judicial action which stand in the way of certainty and uniformity, the deficiencies of the received technique, the undefined edges and overlappings of doctrines and the deficiencies of legal reasoning.'[1]

[1] 'The Call for a Realist Jurisprudence', (1931) xliv *Harvard L. R.* 699.

LEO PETRAZYCKI (1864–1931)

By A. MEYENDORFF

I

ST. AUGUSTINE has remarked: 'I know what time is, but when asked what it is, I don't know.'

In spite of what one might expect, Kant endorses this observation. Some things are undefinable, such as 'Begierde' (*cupido*); nevertheless we have a lot to say about it, and what we say may be quite right.

Petrazycki must have overlooked that remark. To him it seemed ridiculous that jurisprudence was regarded as a science, at least by the European continental scholars, without any agreement as to its subject-matter. Treatises on Roman, German, English, or any other national law, as well as expositions of canon, or international law, of private or public law were valuable attempts to obtain systematic knowledge within a circumscribed segment of positive law as understood by the respective writers. The general definition of law, however, from which they usually start, was no better than the definitions found in treatises on jurisprudence (*Rechtsphilosophie, Theorie des Rechts, Traité de Droit Naturel, Rechtsencyclopädie*, &c.). While the former have to lead to a consistent exposition of the matter chosen by the author, the theorists in legal studies are bound to reflect some of the philosophical doctrines of their time, since in their definitions they almost inevitably state what *ought* to be, not what it actually is. In the opinion of a positivist, and such was Petrazycki (at least from a philosophical point of view), the treatment of a subject-matter which is not, but which ought to be, cannot be regarded as scientific. Still less could it be so, seeing that the thinkers in question were all the time, with very few exceptions, admitting that law, the subject-matter, did exist, but not such as they wanted it to be.

Here, then, arises at once a series of important questions.

How can one tell what law ought to be if one does not know what law is? Have—to put it crudely—speculations or beliefs about law any scientific value? Have they a practical value? Can they have an effect, bad or good?

None of these questions—in spite of his critical attitude towards what had been done before him in jurisprudence—would Petrazycki have answered in the negative.

Speculations about what law ought to be in their historic sequence offer a valuable material for the scientific analysis of certain aspects of law as a social phenomenon, though these speculations in themselves may not contribute to the science of law. Moreover, speculations about what law ought to be have an effect upon law, and therefore again are worthy of examination. If so—and this is the last question we have to ask here—Have we any other criterion but speculation for discerning whether this or that speculation on what law ought to be is good or bad, desirable or undesirable? And here Petrazycki gives the answer of our 'scientific' age, namely: We must discover such criteria, and we shall discover them, if we proceed in a scientific manner. We shall discover what Law really is, where it is to be found, what are the laws governing its existence. We have known for centuries that it is correlated to environment, to geographical, racial, political, social factors. It is a part of the reality we perceive and upon which we feel bound to react. If we discover law, if we discover its true nature, we shall be able to build up a scientific policy as regards the improvement of the law as it appears in human societies.

Speculation on what law ought to be is better than the worship of that segment of law which positive law so imperfectly covers. Therefore the naturalists appeared to Petrazycki to be more human than the positivists of later days (Jehring, Laband, and their followers who have varied their approach). He has, however, maintained that indulging in well-meant postulates[1] was a poor and in-

[1] Kant postulates harmony in liberty; Duguit, solidarity; Kelsen, unity of the legal order; Pound, security of justifiable interests, and so forth.

adequate attitude, and could not equal scientific methods of research into the essence of law.

What are the scientific methods which seemed to Petrazycki so promising? By implication they would be the methods applied for analysing psychological phenomena. Hence his attempt to lay the foundation for an adequate theory of motivation, which, however, we cannot discuss here.

II

The conduct of man is the sphere wherein law must be discernible. No doubt has ever been raised as to the significance of law as a social factor. The observation of man's conduct, besides being biologically or physically conditioned, is also in many respects conditioned by a multitude of 'Musts' and 'Must nots', by 'Mays' and 'May nots'. Nothing is probably so helpful for the understanding of the mental make-up of an individual than to obtain a correct view of the imperatives, prohibitions, and liberties which are, as it were, active forces in his mind, whether he be aware of their importance or not. It is a common experience that this knowledge of a person's mentality often enables us to predict her or his conduct. To make a long story short, it amounts to something like a legal and moral or, to use classical terms, an ethical[1] test added to an intelligence test and both crowning a medical examination which might bring the observer as near as possible to a full knowledge of that person.

Whether one observes a savage, a representative of the criminal underworld, or a person belonging to any other social group, or, finally, the thinker living in solitude and meditation and apparent absence of activities, it is probable that a variety of ethical imperatives,[2] some appearing strange and others familiar to the observer, will be

[1] Kant, *Tugendlehre, Einleitung*: Insel Verlag, vol III, p. 216.

[2] In modern German political and philosophical writings sometimes called *Bindungen*. Their existence leads the French institutionalists to work out their entities—the institution.

discerned. If there exists a scientific method of observation or scientific methods why not apply them? And if they exist, what are they if not methods of psychological observation? As to the ethical imperatives which will be discovered, what are they if not the compound of the moral and legal bonds (duties, obligations) as well as liberties (rights, powers) with their mysterious action? Their action discernible in gesture, gait, attitude, expression? Sometimes it is pride, sometimes contrition, and sometimes anxiety. And apparently organic physical changes follow from the action of the mysterious masters or companions, who tell us: 'This, not that', 'Go ahead, don't worry about what may happen', 'This is your duty, though no one besides yourself can claim it' (moral duty), 'This is your duty towards your neighbour; he claims it' (legal obligation)?

The whole of the world's literature is there to serve as evidence that the mental and moral make-up of individuals, groups, nations, and of Man in general is elicited by the observation and description of such matters.

Hence, Petrazycki concludes, if we want to study morals and law we have to study them in the human mind, or more correctly in the minds of human beings. Having located morals and law in psychology Petrazycki is prepared to find a great variety of material, reducible, however, to averages correlated to age, sex, race, occupation, climate, degree of civilization, and so on.

Law and, almost to the same degree, morals have not been systematically analysed in this manner. Petrazycki regrets that one of the sources of information as to the essence of law and morality—that is the formulated authoritative precept—has been regarded as itself law and morality. It has been common among lawyers and moralists to ascertain the contents of written or traditional precepts of conduct, to sift and systematize the material thus obtained, sometimes to relate it to mentality and peculiar environment where such monuments of human culture obtain, and to imagine that thus law and morals in their entirety and in their essence would be apparent. No

doubt numerous practical considerations support such an approach and such an illusion. For those engaged in such studies anything besides and beyond the statute, the custom, or the precedent seems ludicrous, arbitrary, irrelevant, outside the realm of law, at any rate outside the domain of the law they recognize. Petrazycki thought that the scholar and the practitioner in this exclusive consideration of law as it is lose contact with the vital forces of law. Ignorance of the law, they say, is no excuse. Yet this maxim would hardly be valid unless a good deal of the law were not in the minds of the people. Whenever it is not, conflicts mature—conflicts between the old and the new, sectional and general, regional and national, native and imperial, and what not. And what appeared as the law amounts to a dead letter. People and groups divide and fight; sometimes a deadly fight over what they regard as law. And so do individuals. Some think that this is not so, and that struggle is always about material advantages. But that is yet another question. The main point here is that Petrazycki seeks law as well as morals—which we omit from our exposition—in the psychological domain. Herein he is in keeping with the broad-mindedness of modern anthropologists and sociologists, who discern legal elements in the mentality of all sorts of peoples and refer to positive legal matter as a secondary source, of ultimate importance only to those who confine their studies to its analysis and application.

III

Petrazycki's approach precludes less than he thought the studies with which he himself, as a student of Roman, German, and Russian civil law, has been so familiar. The general propositions, however, expounded especially by German jurists in the 'eighties and 'nineties of the last century, rather than their supreme technique, were in opposition to what he regarded as the core of the problem. Law recognized by the State was not all the law, and its systematization was not all that one ought to expect from

a science of law. Biology and sociology, history and an enlarged and revised psychology, would supply the real material to be examined. As mentioned already, the thinkers who were working out legal principles on the basis of postulates had also their merits, but not the merit of being scientific workers in that field. This of course settles the case of Kant as well as of many others. However, it is curious that Kant can be adduced as an occasional observer of legal psychology in the following abridged quotation from 'Verhältniss von Theorie zur Praxis in der Moral', *Werke*, vol. vi, p. 82, ed. 1913. Kant is answering a certain Garve, who was arguing that human conduct was dictated by pain and pleasure, whereas to conform conduct to duty required an effort beyond ordinary motivation.

'Suppose', wrote Kant in 1792, 'you are the holder of a sum of money whose owner is dead. The heirs are ignorant of the matter, nor are they likely ever to hear about it. Ask a child of 8 or 9 what ought to be done. Add that the holder has a large family and lives in great poverty, which might be relieved if he could use the money for himself. And then ask the question whether under such circumstances this was permissible. No doubt the child questioned would answer "No" without being able to give any other reason except: "it would be wrong" (*es ist unrecht*), that means: it is contrary to his duty (*es widerstreitet der Pflicht*). Nothing can be clearer than this. The problem would not be so simple if the question of the holder's happiness was raised. Because, if he took his decision on account of the latter consideration, he might ponder and think: "If I return the money to the rightful owners they will probably reward me, or if they do not the reputation for honesty might bring me advantages. But all that is very uncertain.... If I embezzle the money, the sudden spending may arouse suspicion.... If I spend it by small sums it might not meet the need. Thus the will acting in accordance with the maxim of happiness wavers between the various possibilities of action. It requires a very clear mind to find an issue between the pros and cons which beset one and not to be deceived in the final result (*Zusammenrechnung*). Whereas if the only question asked is, What is your duty? the interrogated person can entertain no doubts. *Moreover*, in case the notion of duty

has any meaning for the interrogated person he experiences a repulsion to considering at all the possible advantages . . . as if there was anything to chose.'[1]

So far Kant. Note that the whole argument is psychological. 'The notion of duty', Kant remarks, as a psychologist (certainly not on the basis of legal or moral values), 'even in the appreciation of the most ordinary human reason (*der gemeinsten Menschenvernunft*) when submitted separately or in contrast with motives of happiness, is *stronger* (Kant's italics), more impressive, and more effective (*Erfolg versprechender*) than all the motives derived from the idea of happiness.'

Was Kant too wise to meet trouble half-way, since he failed to distinguish between (*a*) the impulse of duty, and (*b*) the contents of the imperative, which he postulated as constant, but which, he knew, were certainly not? Why did psychologists almost ignore what Petrazycki considers to be another fundamental distinction: (*a*) that some imperatives are a force in themselves, for the person's own peace of mind, whereas others (*b*) are strictly dependent upon other people's claims?

Though a lecturer on geography, ethnography, and anthropology Kant, not unlike his followers, was too much engaged in ultimate problems to follow up the variety of species implied in the above quotation. Over a century later Westermarck and Petrazycki, each in a different way, started exploring the world of ethical ideas in the realm of emotions.[2] Kant had observed the propelling and repelling motor force of right and wrong. He had insisted upon the possibility of educating the sense of duty, and he considered, not without optimism, that nature, 'the great Artificer', was leading, if not the individual, at least the human species towards a higher plane by utilizing the

[1] 'Ja er fühlt sogar, wenn der Begriff von Pflicht bei ihm etwas gilt, eine Abscheu, sich auch nur auf den Überschlag von Vorteilen, die ihm aus der Übertretung erwachsen könnten, einzulassen, gleich als ob er hier noch eine Wahl habe.'

[2] Westermarck, *Origin and Development of Moral Ideas*, 1906–7. Behind law and custom he puts the emotion of public disapproval.

forces of psychological attraction and repulsion working in the human mind. And moreover he, like the modern thinkers, such as Hobhouse,[1] assumed that the purposive or teleological factor was becoming ever more active and efficient in human affairs. All these ideas are in the main in accord with the intellectual atmosphere of our own time. It is then surprising that the variety of human loyalties—to use a well-chosen term in Professor Miriam's recent work on civic education (*The Making of Citizens*, Chicago, 1931)—political, racial, ethical, religious, geographical, and also professional, occupational, domestic, and what not, often competing in one and the same community and in a flux throughout the human race, should have so late formed the subject-matter of scientific research and classification from the psychological point of view? Comparative methods in anthropology as well as in law have accumulated a mass of varying contents as regards the rules of conduct. The moral codes and the legal notions of the simple and multiple human groupings are relevant for the study of man. Petrazycki to our knowledge has been the only one who has undertaken to re-examine the process of human motivation, and having analysed the dynamics or mechanism of the urges and repulsions which have a normative power, has begun to discover the process by which the individual and the community come to share or to differ in their legal and moral concepts, and form moral and legal averages ever changing, some decaying, others in formation. It seems worth while to discuss one or two of his often misunderstood statements, though for some others we can refer the reader to recent French and English publications. G. Gurvitch, author of *Le Temps présent et l'Idée de l'ordre social* (Paris, 1931), and Pitirim Sorokin, author of *Contemporary Sociological Theories* (New York and London, 1928), will probably not refuse to be in many respects regarded as Petrazycki's pupils, in spite of their disagreement with their teacher in some points of importance. Both writers give accounts of Petra-

[1] *Morals in Evolution.*

zycki's approach more fully than can be done in a single lecture.

In Germany the initial stage of Petrazycki's achievement earned him immediate recognition by his teacher Dernburg after the publication in 1892 of an analysis of the principles governing the distribution of the fruits in the event of a change in the person of the legitimate user (*Die Fruchtverteilung beim Wechsel des Nutzungsberechtigten*). The two volumes, *A Doctrine of Income* (*Die Lehre vom Einkommen*, 1893 and 1895), not only established the reputation of the Polish graduate of the Russian University of Kiev, but actually brought about some alterations in some of the articles of the draft of the German Civil Code. His *Aktienwesen und Spekulation*, translated from the Russian in 1906, is representative of what Petrazycki's views were as regards the part played by statute law in shaping the economic conduct in a modern community. (It also contains a theory of prices.) Present developments might revive the interest in his disquisitions.

Petrazycki's jurisprudence cannot be studied fully otherwise than in his Russian works, of which a small part is available in German translation (*Über die Motive des Handelns*, Berlin, 1907). A complete translation into Polish of his *Introduction into the Study of Law and Morals, Principles of an Emotional Psychology*, 3rd ed., was published in 1930, shortly before his death at the age of 64, in Warsaw, where he held the Chair of Philosophy of Law. The Bolshevik Revolution had rendered the continuation of free scholarship in his subject impossible. In spite of his being all the time loyal to his Polish descent, Petersburg University had become for nearly twenty years his centre of activities both scientific and political. As far as a mind of his calibre could conform with party politics he remained active in the Central Committee of the party led by Professor Miliukov. In 1906 he sat as one of the members of the Imperial Duma returned by the capital. He put his signature under the Viborg Manifesto, of which he did not approve, and served a short term of imprisonment together

with the other signatories for that appeal to refuse taxes and conscripts for the army to the Government of the day.

These scanty notes are insufficient to locate Petrazycki as an innovator in the domain of jurisprudence. From personal knowledge and prolonged studies of his work I feel bound not merely to place him on a pedestal but to place him in some relation to his time. A few sentences may bring him nearer to the reader.

His inherited loyalties were Polish and catholic. He was a keen observer of nature and country life, a passionate huntsman in his younger days. The Russian school and more so the Russian University was for the intelligent pupil intellectually stimulating, though neither the moral nor the political influence which it was meant to be. Comte and Spencer in philosophy, Savigny, Maine, and Jehring in law, together with the controversies about Socialism and Liberalism with Mill, Buckle, Draper, were then influences that counted in Russia, with, of course, Darwin as a general background. A strong belief in the powers of Science was then general and was no less strong in the Faculty of Law than in the Faculty of Medicine, in which he also spent a year or two. To contribute to the discovery of the laws of human development seemed to those who had not discovered them already in Socialist doctrine and in revolutionary activities the only right thing to do.

Petrazycki, as an undergraduate, translated from the German Baron's popular text-book on *Roman Private Law*. This, after graduation, brought him as a Government research student to Berlin, where Dernburg, Schmoller, Brunner, Gierke, and others were prominent. Two things seem to have happened. He took sides in the German legal and economic controversies of the day, but he realized that his powers transcended the mastery of technique he found in Berlin by reason of his detachment from purely German ways of approach. For a foreigner in pursuit of supernational aims this happens to be a natural advantage. What resulted will be sketched in the following pages.

IV

Some of the main results of Petrazycki's research leading up, after 1900, to his psychological theory of law may be summed up as follows:

The persistence of the principles of private law—property, contract, inheritance—presented a problem in itself observable in the twenty centuries of Romanistic evolution. Along with that persistence there were operating slowly quasi-biological adaptations to social and economic requirements, such as uninterrupted economic production, which was secured by the advantages conceded to the bona-fide possessor as against the owner. Hence law, custom, and judicature deserve close attention as motives for human conduct. Modern principles governing civil litigation, namely the passivity of the Court (*Verhandlungsmaxime*), in the opinion of Petrazycki, encourages tricks, stratagem, and artifice. Company law fosters rash speculation with other people's funds. A scientific policy of private law (*Civilpolitik*) as well as a general policy of law (*Rechtspolitik*) should proceed on the basis of psychological data as to the probable effect of contemplated alterations in the law, rather than in accord with formal deductions from purely juridical premises, the more so as the juridical premise is often a faulty abstraction from precedents.

I may be mistaken, but this latter observation, derived from Petrazycki's writings on some problems of Roman law, seems in complete accord with the cautious attitude of the common law school in the English-speaking world towards generalization.

The criteria of desirable conduct to be aimed at firstly in private law and secondly in all fields of legislation seemed to him to be peace and charity[1] allied with persistent honest work which is sure of its reward. His critical analysis of fallacious legal generalizations was supreme.

[1] *Lehre vom Einkommen*, vol. ii. The remarkable Appendix in which the young scholar's mind plays freely with some of the basic social problems of his time.

V

If he had not been versed in the technical difficulties of the matter Petrazycki might have become a shallow utilitarian indulging in superficial recommendations for desirable reforms. He had shaken the formal refuge of the jurist, and revealed the inconsistencies of elaborate systems. The law in force could no longer appear to him to be all the law, nor could it be the desirable law, though it seemed that any law was more in the nature of things than no law at all. These peculiar antinomies forced his mind to examine more closely the nebulous ethical atmosphere in himself and around him and everywhere in the past and present. Positive law, though fairly persistent, is in constant change, and non-recognition of that positive law also is constantly changing. What did it all mean? It will be seen that, as a Pole, he was well placed for realizing more vividly the conflict of loyalties. If he had not had the scientific beliefs of his time, he would have despaired, or he would have lost himself in truisms and generalities. Or he might have joined in a rebellious national or class movement. A rapid forcing into existence of the 'better' law and a constant replacing of the law would result in no law at all, which was the worst of all.[1] Moreover, the aspirations for a 'better' law were not necessarily higher and better, judged by the standards of charity, peace, and honest work, than the positive law. Positive law and positive morals were not necessarily lowering the standards. One would assert rather the contrary, if one thought only of the legal concepts of the primitive savage, or of the self-asserting intellectual, like Nietzsche, or of Tolstoy's blind belief in automatic social self-adjustment, dictated by the individual's own heart or best self.

In terms of contemporary trends one might say that the German Historic School, and the comparative method as applied by Sir Henry Maine (so popular in Russia), had

[1] Cf. a parallel in Kant's essay on *Perpetual Peace*, English version, Edinb. 1891, p. 113.

firmly implanted in Petrazycki's mind the notion that positive law was not a capricious invention. On the other hand, as a Pole and as a Russian intellectual, none of the positive systems of the day, and more especially none of those in Germany and Russia, could impress him as the supreme and final authority. Lastly, the growth of Roman law and its survival value was bound to appear as something similar to what the Darwinians regarded as the biological process. His psychological theory of law appears thus as an attempt at solving the antinomy between society and the individual, or, to put it more precisely, between the moral and legal dictates of the individual mind (intuitive morals and law) on the one hand and the dictates of society (positive morals and law) on the other.

VI

Since we have already explained that Petrazycki locates imperatives in the place or centre which experiences them, namely in the mind, it will be easiest to follow his doctrine under the three headings *individual, society*, and *the relation between the two* as regards ethical (moral and legal) rules.

All human beings and probably the higher animals experience imperatives, urges. These experiences are practically emotional in their character; dynamic (*movere*, to move), they impel with varying force or they repel. (See above, Kant's observation.) They to a varying degree contain conation, cognition, and a pleasure and pain element, also in a varying and most undistinguishable mixture. A psychological analysis would show that two main categories of such emotions are permeating man's life. Some impose a conduct which is not related to anybody's claim (*imperative* norms of a unilateral nature appear acting in our mind). Petrazycki calls them moral emotions irrespective of the contents of the imperative. The corresponding rules form what he calls intuitive morality, comparable to the rules of a game one practises by oneself, without a partner. Non-compliance with such

imperatives leads to greater or lesser disturbances in the individual mind. The contents of the corresponding imperatives are varied and changing. The madman, the child, are no less subject to such emotions than the philosopher or man of the world, our enemy no less than our friend. To state what the contents of such emotions *ought* to be is pure speculation, not science. The *imperative-attributive* emotions (law emotions) also dictate a specific conduct or attitude, but imply another subject to whom a right to claim that attitude is attributed. Hence reminder, admonition, reprimand, and even compulsion are felt to be justifiable, as well as compromise and release. The contents of the law emotions are as varied and as changing as the purely moral emotions, and identical precepts can appear either as morally or as legally binding.[1] The child, the criminal, the madman, are no less experiencing imperative-attributive emotions than the normal, law-abiding citizen. To establish what these emotions ought to be is pure speculation, not science, though a scientific policy is desirable, and not impossible. The reader will now understand that Hamlet's relationship to the ghost of his father is in terms of Petrazycki a legal emotion. The reader will furthermore understand that the subject to whom the claim is attributed—and an insistent, powerful claim it can be—is occasionally a projection of the imperative-attributive emotion—ghosts, dead people, collectivities, objects, institutions, divinities, the Covenant in the Old Testament, reflect the attributive function of the legal emotion. The eventual claimants, as we see, may be as varied, or conventional, as they appear if we examine realistically human relations, in the domain of intuitive as well as positive law.

Both types of ethical emotions—the moral and the law emotion—manifest a tendency towards *positivation* and *unification.* This is a very important psychological observation. If anything, these tendencies reflect man's sociability.

[1] In the Old Testament the precepts have a legal character, in the New Testament the same precepts are meant as purely moral rules.

It can be accepted as a rule that the subject experiencing an imperative, or an imperative-attributive, emotion tries to obtain the participation of other people in that emotion. Art, literature, the press, and daily intercourse confirm that observation. Man strives and even fights for having his ethical emotions confirmed, approved, sanctioned, by other men, by society. He either urges that his emotion agrees with 'positive' rules, or he insists that such a rule should be laid down. If similarity of environment, occupation, common descent, and so forth, form the background for a similarity in emotions, an average of rules—a *unification* of the habitual conduct will create a set of *positive* morality and of *positive* law. A microscopic view of the process of positivation and unification would show that the moral code has an irenic development if not tainted by legal connotation, whereas the legal positivation, and unification, will bear the characteristics of contest, litigation, fight, and compromise, as the quasi-biological adaptation process of the individual to society, or of one group to another. Positive law, either customary or statute law like judgement, amounts to surrender and peace. However, the pacification is temporary, because in its contents it is as varying and changing as the molecular, individual kinetic force which underlies it. It is a social necessity, a condition of social order, but in flux nevertheless. This nature of the interplay between intuitive law and positive law answers the question put by Pitirim Sorokin[1] and which, he thinks, Petrazycki did not answer: 'How is it that people submit to a law they hate?' The incongruity between intuitive law and positive law passes through stages and degrees of compromise and conflict. Adaptation, formation of averages, patterns of conduct, conflict of loyalties, such is the travail of integration and disintegration of social groupings.

The famous question whether Force is the source of law in Petrazycki's theory is answered by the question, What is Force? As material force does intervene, there

[1] *Contemporary Sociological Theories* (New York, 1928).

are times when a conqueror imposes his law. The master's law is often in a tacit conflict with what the servant regards as law, the tacit conflict some day becomes an open contest, which again may end in submission to force. In spite of this, nothing being final, the validity of an uncongenial law is less well founded than the one which is in some relation with 'public opinion'. Even under an inadequate law the expert (lawyers and judges) is a fighter against force. He experiences the command to clarify the rule of law and to uphold its validity, its unity, to speak with Kelsen.

It is evident that the psychological theory does not pretend to possess a criterion for what law ought to be. This has been regarded by some (B. Chicherin, Trubetskoy, Stammler) with special reference to Petrazycki as an abdication from the postulates of ethics.

Furthermore, it is clear that Petrazycki's theory covers many phenomena which so far have not been related to jurisprudence. He includes in the domain of legal phenomena: (1) activities regarded as futile, such as games, manners. The observance of game-rules is not irrelevant to the legal education of a people in the usual sense of the word. (2) Intimate relations in the family circle, among friends, with their network of subtle duty-right emotions. (3) The legal world of the nursery, where the formal rule prevails in the infant's mind, and where the education of a legal sense ought to begin. (4) Obsolete custom, primitive law, savage law, anticultural law (say infant marriage) appear to him as valuable material for the understanding of the working and the correlations of the legal emotions. (5) Legal emotions referring to others than human beings, to animals, objects, supernatural beings, &c. (6) The legal ideas incorporated in religious systems. (7) The concepts of obligations in the comradeship of criminals, defective people, &c.

By extending into so vast a field the material which a theory of law as a science for the classification of law phenomena ought to cover, and by which such a theory is

verifiable, Petrazycki manifested his faith in science. He has by observing that field stated a number of tendencies which further experimenting and observation might corroborate as being the laws of the growth of legal mentality, impelling, perhaps, towards an ever higher pattern of conduct.

Little did he expect for his 'Science' from a pure statement of postulates defining Law. Whether in the predicate of the respective propositions there figured words like liberty, order, interest, justifiable reliance, authority, he convincingly proved that the formula reflected the equation $X = X$.

Jurisprudence as treated by Petrazycki offers a wide horizon. It prepares the student for an international outlook, for a historic perspective, for a sociological and anthropological approach, and sharpens the eye for significant details. His theory of jurisprudence is the one which I think more than any other takes into account the process of human motivation, contemplates both alternating stages —change and stabilization in constant succession—without prejudice, and fosters the understanding of a variety of types and degrees of culture. Ultimately it works for a tolerance intolerable to the partisans of swift action, but characteristic of the preachers of and believers in Science.

A complete translation of his works will hardly be possible. He was a great master, but not of style. His writings in more than one respect require readjustment to the present level of psychological and sociological doctrine. A number of points developed with great care by Petrazycki are no more controversial.[1] However, the substance of his theory deserves a more detailed account than the sketch attempted here. Much of his thought has found confirmation in modern thinkers, and more of it may be corroborated in years to come.

[1] As, for instance, the rejection of the tripartite division of psychology into the sensorial, cognitive, and conational aspects.

STAMMLER'S PHILOSOPHY OF LAW

By MORRIS GINSBERG

'WHOEVER', says Stammler, 'would be a philosopher of the law must first breathe the dust of legal archives.' I have not breathed this dust, and I therefore cannot deal with Stammler's legal philosophy as a lawyer. I propose to confine myself instead to its philosophical aspects, and this, I venture to say, is legitimate procedure, since in essentials what Stammler has sought to do is to provide a philosophical analysis of law in terms of the Kantian system or method.

Stammler has given several elaborate expositions of his theories, notably in the following works: *Wirtschaft und Recht* (1906), *Die Lehre von dem richtigen Rechte* (1902), *Theorie der Rechtswissenschaft* (1911), *Lehrbuch der Rechtsphilosophie* (1922). It is obviously impossible in a short paper to do justice to so rich and complex a system as Stammler's. I must content myself with a brief account of the essential elements in his theory and an estimate of the value of his contribution to the philosophy of law.

Stammler distinguishes between what he calls technical legal science and theoretical legal science. The former is concerned with the elucidation of any given legal system, the connexion between its parts, the application of general principles to particular cases, and so forth. Theoretical legal science, on the other hand, is concerned with law as a set of rules formulating the means to fundamental human purposes, and it has to inquire into the real value of the means employed and to discover the basis and justification of actual law. Both technical and theoretical legal science deal with law as it is, but while the former is content to bring out the meaning of given rules, the latter goes farther and relates them to more fundamental principles, or if possible, to one ultimate principle.

The method to be followed in the theoretical study of law is in essentials the same as that followed by Kant in his

Critiques. It may be called the 'critical' method. Its nature may be best understood by contrast with the historical or psychological method. Thus, for example, in dealing with knowledge, we may study it genetically, that is, inquire into the way in which certain beliefs have come about in the course of time, or we may inquire into the elements of which beliefs are made up, the conditions of their occurrence in the individual mind. The critical method is not concerned with either of these problems. It is concerned rather with the question as to what must be presupposed if there is to be any knowledge at all, and it seeks to arrive at these presuppositions by an inquiry into the 'formal' elements of knowledge, that is to say, those elements of knowledge which are found universally and which do not vary with its matter or content.

It is by following this method that Kant 'deduces' the forms of sense, that is space and time, and the categories of the understanding, such as substance and causality, quality and quantity. It is by an analogous method that Kant inquires into the fundamental principles that are implied in the particular moral judgements that we make, and he shows that they rest upon the assumption that there is a law which is in its nature binding or obligatory irrespective of our likes and dislikes, and that this law is universal—a principle formulated, it will be remembered, in the famous formulae of the Categorical Imperative. The task that Stammler has set himself is in essentials the same as that of Kant. He seeks, namely, to disentangle the pure forms of law, that is the necessary and universal elements which are found in all legal propositions irrespective of their particular content or matter. He seeks to ascertain what law is as such and how it is distinguished from other species of social regulation. Further, just as Kant in the *Critique of Pure Reason* distinguishes between the categories of the understanding and the ideas of reason, so Stammler distinguishes between the concept of law and the idea of justice. The concept of law sums up the forms of law, that is to say, as we shall see, the different ways in which means

are related to ends in social volition. The idea of justice provides us with a criterion of *just* law. It lays down an ideal of a completed harmony of human striving to which law approximates and in the light of which it may be criticized. He claims that his difference from Kant consists just in this: that Kant did not employ in his ethical inquiries and in his philosophy of law this idea of a completed harmony, and contented himself with the categorical imperative. I shall inquire later whether Stammler does in fact go beyond Kant in this. Meanwhile it is important to show that Stammler's inquiry consists in essentials of two parts. One is concerned with the concept of law, that is the deduction of the forms of law. The other deals with the Idea of Justice or the ideal in the light of which we can determine what is not merely law but *right* law (*richtiges Recht*).

(*a*) *The Concept of Law.*

There are, Stammler thinks, two ways in which order is introduced into the contents of consciousness, namely, perception and will. The former seizes the impressions of sense and arranges them into objects; the latter sets itself an object as something not present in perception, but to be attained in the future.

The connexion between perception and will is to be found in the temporal relations between objects, the relations of permanence, coexistence, and order in time. The present may be the necessary outcome of a preceding cause, or it may be regarded as a means for a future end. Things may be regarded either causally or teleologically. In willing we are concerned with the latter, that is, with the ways in which means are related to ends. By end is meant an object to be attained: by means a cause to be chosen which will bring about the end. Now law is a species of volition. When we make a legal claim we want something. When we formulate a legal principle we do not assert a fact of experience but rather an end or purpose to be fulfilled. By saying that law is a species of will we do not mean that

it is created by will, or that it is its product, but that it *is* will, that is, one way in which will appears. How, then, does law differ from other non-legal forms of will? To answer this question certain distinctions are necessary. In the first place, will may relate to the ordering of means and ends within a single personality. This Stammler calls isolated or separate volition (*getrenntes Wollen*), and it constitutes the sphere of morals. It is to be distinguished from the binding will (*verbindendes Wollen*), which implies a social relationship, that is, the use by one will of the purposive acts of another as a means to ends of his own. Society may in fact be defined as a group of wills which function as ends and means to each other. Society also means co-operative effort in the attainment of common ends, that is, ends of identical content. But this is a derivative notion, and implies the existence of society in the first sense, since without social regulation there can be no unity of aim. Law is a species of binding will. It is concerned with the outward acts of men in a social relationship. It may be noted in passing that the term 'binding' or *Verbindendes* is ambiguous. It may mean 'uniting or linking or bringing into relationship', and it may mean 'obliging'. It is the first sense of the word that is to be stressed in this connexion. The notion of obligation remains to be considered. If law is a species of external regulation, yet not all external regulation is law. Here a second distinction is necessary. A regulation may claim to be its own authority and to impose an obligation upon all those who come within its sphere of application, whether they like it or not. On the other hand, there are regulations which bind individuals, but only to the extent to which they consent to be bound by them. Here is the basis for the distinction between conventional and legal rules. Note that the distinction is not based upon psychological or historical fact. It is not that law in fact is accepted as authoritative while conventional rules are in a measure optional. It is rather a question of what law and convention are in their nature or what they claim to be as such.

Within the regulations that are both binding and claiming to be their own authority, we must further distinguish between the arbitrary will, that is to say, a decision arrived at from case to case on no underlying principle and subject to the whim or caprice of the commanding authority, and the constant and inviolable will, applicable to particular cases as they occur irrespective of subjective likes and dislikes. Law claims to be in its nature inviolable. We may now bring together Stammler's final definition: law is a species of will, other regarding, self-authoritative (or autonomous) and inviolable (*das unverletzbar selbstherrlich verbindende Wollen*).

(*b*) *The Idea of Justice.*

I will not here follow Stammler's further elaboration of his definition of law and his effort to deduce from it a list of fundamental legal categories, but will proceed at once to the second part of his inquiry which is concerned with the criteria of just law. The problem here is to find a principle to guide us in the ordering of human volition. Not every volition is right merely because it occurs. What constitutes rightness? What is the ground of a volition in virtue of which it may be said to be right or justified? In answering this question Stammler follows a procedure which at first sight reminds one of Kant. He shows that there are two ways in which valid ground may be given for an act.

i. A certain means may be shown to be necessary for the attainment of a particular aim or end. The object then has value in relation to the particular desire. *If* the end is desired, the means must also be desired. But both end and means may have only 'subjective' value. It will be remembered that this is what Kant calls the hypothetical imperative.

ii. But, secondly, the ground of an act may claim universal validity. Here Stammler claims to improve on Kant. Kant thought that in contrast with the hypothetical imperative which merely says: if you want this, do that, the categorical imperative says: do this without any regard to any particular end to which you may or may not be

inclined. It prescribes a form of action universally binding. Hence it will be remembered the first formula of the categorical imperative: so act that you may at the same time will that the maxim of your action shall become a universal law. In Stammler's view this is insufficient. There is needed in addition what he calls the Idea of Justice, that is something in the realm of will analogous to Kant's Ideas of Reason in the realm of speculative thought. It is the idea of a complete harmony of all striving or endeavour. Such a harmony is not, of course, an object of experience, it is rather a limiting notion or ideal to which the will must endeavour to approximate, a task which can never be completed but which yet must ever be undertaken afresh. It bids us ever to subordinate the particular to the universal, and to regard all definite aims in their relation to the possible completed harmony of all ends whatever. It will be seen that this ideal is entirely formal. It does not of itself suggest or motivate any particular line of behaviour. It is rather a way of dealing with lines of behaviour whatever their source. In this Ideal of Right Stammler finds the fundamental principle which is to regulate all volition whether moral or legal. The distinction between these, as we have seen, is found in the distinction between the *getrennte* and *verbindende Wollen*. Morality is concerned with the inner life, with purity of intention, with the will as an expression of the inward personality. Law is concerned with the external relations of men, with the wills of men in so far as they bind each other. The Idea of Justice can be applied to both species of volition. In the case of morality it leads to the notion that Stammler calls the Pure Will. By this he means a will free from the urgency of particular desires, capable of regarding all such desires in the light of the unconditioned and the whole. From this notion of the Pure Will there follow in his view the following general principles of morality:

1. The principle of truthfulness: Do not seek to escape from yourself; seek to harmonize the conditioned with the unconditioned.

2. The principle of perfection: Do not let any particular aim dominate your will.

Subordinate the conditioned to the unconditioned.

In the sphere of law the Idea of Justice gives rise to the notion of the Pure Community. Here we are concerned with acts of will which are directed to others, in which individuals use each other as means and ends. A community has a pure will when its regulations are inspired not by subjective desires but by principles of universal validity, that is to say when they conform to the ideal of a complete harmony. From this there follow the fundamental principles of *Right Law.*

1. Principles of Respect.
   (*a*) No act of will should be subjected to the arbitrary control of another.
   (*b*) No juristic claim is valid save on condition that the person to whom it applies may remain his own neighbour (i.e. an end in himself).
2. Principles of Co-operation.
   (*a*) No member of a legally bound community may be arbitrarily excluded from it.
   (*b*) No legal right may be exclusive save in so far as the person excluded may still remain his own neighbour.

The general purport of these principles seems to be that the social ideal justifies the binding will, but only on condition that while being bound all individuals may yet remain ends in themselves. This is, of course, also Kant's view, as Stammler himself notes (*Rechtsphilosophie*, p. 199, 4), but he adds that Kant uses the formula only in connexion with the relation between the individual and the State, and he complains that Kant makes no further use of it in his *Rechtslehre.* I shall return later to the question whether Stammler really takes us farther than Kant. Meanwhile, in order to complete my exposition of this part of Stammler's theory, it is necessary to refer to his discussion of the basis of legal obligation, of the relation

between law and the State, and of international law. He objects to the view that the basis of obedience is moral. But this is largely a matter of words. For Stammler the moral is confined to inward motives and it cannot have anything to do with problems of outward legal compulsion. But ultimately the basis of morality as well as of right legal regulation is to be found in the fundamental principles derived from the Idea of Justice. To ask the question whether right law is obligatory seems idle, since obligatoriness is involved in its definition. On the other hand, whether any particular law is binding is an important question. But this kind of question, as belonging to the detailed discussion of particular legal systems, is not raised by Stammler, and in general, he leaves us rather in the dark as to how he conceives actual law to be related to right law.

Law, in Stammler's view, is not derived from the State. The latter is in fact only one type of legal order and therefore presupposes the notion of law in general. Law, on the other hand, can be defined and contrasted with other forms of social regulation, such as the conventional and the arbitrary, or with moral rules, without bringing in the notion of the State. The latter notion in short does not belong to the pure forms of law and is conditioned by particular circumstances. The relations between States are subject to law. But world law is not to be conceived as a world morality. It is true law, and is concerned not with inward motives, but with external or social regulations. World law is not *Völkerrecht*, which in practice is concerned only with European civilization. *Weltrecht* is not incompatible with the existence of sovereign States. Such States may be regarded as true subjects of law, i.e. entities recognized as ends in themselves. International law does not create new law overriding other existing law. Rather does it seek to bring about changes in the content of the existing national legal orders. The obligations of international law do not depend upon the existence of a league of States. Here, as elsewhere, it is the Idea of Justice or

right that ought to inspire the law and not the merely subjective desires of particular States.

Such in rough outline is Stammler's philosophy of law. I propose now to deal briefly with the more important criticisms that have been put forward against his views.

A great deal of what has been written in opposition to Stammler appears to be due to a misunderstanding of his real position. It has been urged, for example, by Kantorowitz, Kaufmann, and others that Stammler's fundamental principles do not afford a basis for the derivation or deduction of particular rules, that they are empty, sterile, or merely 'formal'. Seeing that it is their formal character that Stammler is most anxious to stress, it is clear there must be something wrong about the criticism. In fact Stammler clearly explains that his principles are not to be regarded as themselves legal principles, or fundamental *Verfassungsartikel* to be used as major premises under which particular rules are to be subsumed. They are rather standards or criteria in the light of which particular rules, which they do not themselves produce but which must be conditioned by experience, are to be judged. Given any particular legal rule, we may ask whether it possesses the formal structure that it ought to possess if it is to conform to the standards of law as such.

A second objection that has been urged against Stammler is that he commits a grave error of method when he seeks to derive a norm or standard of values from a mere analysis of the pure forms or categories implied in legal or juristic propositions. 'The relation between value and actuality is not the same as that between form and content. In bringing down norms to the level of categories, Stammler obscures the real nature of law.'[1] But this is far from convincing. To begin with, the analysis of judgements or propositions asserting values with the object of disentangling their pure forms or categories is not intended to supply us with an account of the nature of value itself. Ethical or juristic propositions have

[1] Kaufmann, *Kritik der neukantische Rechtsphilosophie*, pp. 14–15.

forms like other propositions, but no account of their forms would be given if the propositions were not there to begin with. Secondly, and this is the more important point, Stammler really tries to do two things. The first is to determine the nature of law by what may be called a categorical analysis, and to compare it with other forms of social regulations, such as the conventional or the arbitrary, and with morals. This analysis applies to good and bad law alike. The problem of the rightness of law is attacked by the aid of Stammler's theory of the Social Ideal. This as an idea of reason is to be clearly distinguished from the categories of law. Nor is it fair to accuse him with Kaufmann of hypostatizing this idea and of regarding it as an agent which brings about, or is a guarantee of, progress. This is precisely what Stammler does not do. He insists that the idea of reason is not creative, and that in dealing with progress we must clearly distinguish between the problem of the nature of progress, and the question whether progress has in fact occurred; and while he is prepared to supply the requisite definition, he leaves the question of fact, so far as scientific proof is concerned, open (*Rechtsphilosophie*, pp. 366–7).

The really crucial part of Stammler's theory, as it seems to me, is his discussion of the Idea of Justice. His principles both of morality and of law are really expansions of this idea. They take for granted that by means of it we can determine what can be objectively justified in human volition, and what must be regarded as merely arbitrary or subjective. Has Stammler really gone, as he claims, beyond Kant in elaborating this idea of reason, or do his criteria after all remain essentially the same as those suggested by Kant in the various forms of the categorical imperative, and if so, are they not exposed to the same difficulties as those which have been repeatedly urged by critics of Kant? The most general expression for the Idea of Right is that it is the thought of a complete harmony of endeavour. It is not the totality of the forms or categories, but rather the whole of experience actual and possible as a unity. This totality can never be grasped as

an object of experience. It sets thought or will a task, namely, to bring any finite volition or experience into harmony with the unity of all thinkable volition. Can this extremely vague notion really help us in dealing with particular volitions? By this I do not mean to ask whether from it can be deduced any particular rules of action. To expect the latter would be completely to misunderstand the proper function of the idea. But it is important to show that it can be used as a criterion in the light of which we could judge particular rules or acts of will. A careful study of Stammler's work shows, I think, that though he claims to have gone beyond Kant in this very matter he does not in fact use the idea of reason in the sense of a complete harmony, but appeals to the criteria employed by Kant, namely formal universality, exclusion of particular aims or ends, and the notion of individuals as ends in themselves. Thus the 'Pure Will' is the will guided by universal law or the law of justice. The 'Pure Community' is a community in which 'every one makes the objects of others his own as soon as they permit of an objective justification',[1] or a community in which 'the members are reciprocally ends and means'. Now an examination of Kantian ethics and jurisprudence shows that there is much of value in these criteria. It is important in dealing with proposed acts to ask whether they would stand the test of being universalized, or whether they involve the use of others merely as a means. At the same time it is now generally recognized that these criteria do not take us very far. Whether a line of action can be rightly universalized cannot be decided without an appeal to some other principle than the categorical imperative, and whether the use of a person as a means is incompatible with his being also used as an end in any given case or cases cannot be decided without further knowledge of the potentialities of human nature and of the effects of given acts upon those potentialities. But Stammler, like Kant, interprets the universal law as excluding all particular

[1] *Wirtschaft und Recht*, pp. 581 and 600.

ends. This seems to me to defeat the effort, in itself of the greatest importance, to work out the implications of the idea of rationality in relation to human conduct. Rational conduct, whatever else it may be, is purposive conduct. This, indeed, is insisted on by Stammler, who regards the whole problem of social life as concerned with the right ordering of means in relation to ends. His idea of a complete harmony is surely that of a totality of all ends reduced to some form of unity. It must, therefore, include all ends in so far as they can be harmonized. The real problem is thus to find the conditions of harmony. But this Stammler does not attempt to discuss. Had he done so, it seems to me, he would have found that the general principles regulating social life must include not only those principles of a purely logical order, such as those which insist on relevance, comprehensiveness, and consistency, but also principles which define the place of specific purposes in relation to the wider good which in harmony they constitute. In short, the task of legal philosophy would seem to be not to rest content with the idea of justice as a remote idea of reason, but to endeavour to give it concrete form by defining the proximate conditions of the harmonious realization of human purposes.

To a large extent the difficulty arises from the extremely vague use of the terms 'subjective' and 'objective' in describing ends or purposes. Let us consider this a little more in detail. By subjective may be meant:

i. Forming part of a subject's mental activity. In this sense all desires are subjective. What is desired, that is the object of desire, need not so far as purely formal argument is concerned, be a part of the mind desiring, or of any mind, though of course states of mind *may be* also objects desired.

ii. Dependent upon some peculiarity of an individual desiring and variable as between different individuals.

iii. Dependent upon a momentary or temporary state of the subject desiring in contrast with his permanent or enduring needs.

iv. Apparent as contrasted with real desire. This contrast

partly overlaps with (ii) and (iii). But it also includes cases where desire is stimulated by a mistaken view of the nature of the object desired. In such cases the desire may cease when the true nature of the object is known.

v. By subjective is also sometimes meant, though very confusedly, the arbitrary or ungrounded. But a choice may be ungrounded either because it is based upon a mistaken view of the object, or of the needs of the subject, or because it does not take into consideration other relevant needs.

By contrast an objective treatment of ends is a rational or well-grounded treatment of them, that is, one based upon an accurate apprehension of the intrinsic nature of the ends, and of their relevant relation to other ends and means in a systematic whole of life. Bearing these points in mind it seems that the objective treatment of ends would involve the following:

i. To ascertain the intrinsic nature of ends and to clear them from irrelevancies.

ii. To discover which of them are constant in the sense of being necessary for the enduring satisfaction of the individual, and which more variable or permitting of substitution, replacement, or sublimation.

iii. To show which are common to all individuals and which depend upon individual peculiarity. This would involve also a consideration of the justification of the differential treatment of individuals.

iv. To study ends in relation to each other, that is, to inquire whether ends tend to form systems or not, whether they permit of being satisfied in harmony or whether there are ends the satisfaction of which is incompatible with the requirements of systematic organization.

v. To consider ends in relation to the means necessary for their attainment and, in particular to clear up the confusions arising from the mixing up of ends and means, instrumental goods and intrinsic goods.

vi. In all these considerations to bear in mind, not the individual in isolation, but the requirements of social life.

It will be seen that an objective treatment of ends in this sense does not require us to eliminate all particular ends. On the contrary, it is a certain way of considering particular ends. The function of reason in relation to the ends of impulse and desire is not purely formal, nor is it confined to the consideration of the relations between them and the means which are required for their realization. Reason defines and clarifies, connects and systematizes the ends of endeavour, and in doing so transforms their very nature. To prove the rationality of ends it is necessary to show that they stand the test of critical scrutiny, that they are well grounded in the sense that a reason can be given for them by reference to their intrinsic value and their relation to other ends. The chief defect of Stammler's theory and that of other neo-Kantians seems to be that they are based on too abstract a view of reason, a view which makes it impossible ever to bring the particular aims of action into relation with the universal and which, while doing lip service to a remote idea of reason, leaves actual law and actual morals at the mercy of empiricism and the blind forces of tradition.

M. DUGUIT'S CONCEPTION OF THE STATE

By HAROLD J. LASKI

I

NO observer of recent jurisprudence can fail to remark the immense stimulus which M. Duguit contributed to its development. Whatever differences of view he may have excited, his was the signal merit—one more rare than we like to admit—of compelling men to reconsider the foundations of their thought. His book had something of the effect upon his generation of the *Esprit de Lois* nearly two centuries ago. Disciples and opponents alike were driven to adjust their thought to the new perspective it supplied.

One other virtue in his work was of outstanding significance. It had been the demerit of jurisprudence for a generation before his time to think in terms of the technical consequences of unexamined preconceptions, rather than to seek for the basic notions themselves an assured foundation in the facts. Jurists had forgotten that their science was a social science, that its principles must be squarely rooted in the economic and political facts about them. Their neglect of economic and social change made much of their construction seem aloof from life itself. A new jurisprudence was needed for a new world.

I believe that when the history of French jurisprudence in the last generation comes to be written, the iconoclasm of Duguit will appear as something like the dawn of a new Renaissance. By attacking notions like sovereignty, rights, corporate personality, which had become dangerous commonplaces of thought, he compelled legal thinkers to a new awareness of their principles, a new sense of the importance of discovering their direction. I venture myself to doubt whether his positive contribution to jurisprudence is likely to seem as important in the long run as its purely critical side. But no one can examine the work of Gény, Jèze, Hauriou, Carré de Malberg, to take only

some of the more outstanding names, without seeing that Duguit has widened and clarified the horizons of jurisprudence.

It is in recognition of the greatness of his contribution, and not in detraction from his importance, that I venture in this paper to criticize some of the essential features of his conception of the State. No one does service to the memory of an eminent thinker merely by accepting the postulates he lays down; still less if, as in my own case, one has been profoundly influenced by his conceptions. We can only arrive at a satisfactory estimate of M. Duguit's ideas by the most careful examination of what is assumed in his fundamental notions.

II

Duguit sought to outline a theory of the State which should be free from all fiction, and from the fetters of metaphysical notions. It was to be a positive and realistic theory, scientific in the full sense of the term. It was to be built from the facts that one encountered in life, untrammelled by the effort to force them into the terms of some preconceived hypothesis.

Men live together in groups and societies; they are dependent upon, solidarist with, one another. They have common needs which they can satisfy only by a common life; and, at the same time, they have different needs the satisfaction of which they assure by the exchange of reciprocal services. The progress of humanity is assured by the continuous growth, in both directions, of individual activity. Man, so placed in society, has the obligation to realize this progress because in so doing he realizes himself.

From the immanent force of things, therefore, there arises a rule of conduct which we may postulate as a rule of law. He must so act that he does nothing which may injure the social solidarity upon which he depends; and, more positively, he must do all which naturally tends to promote social solidarity. The rule of law, of course, imposes different duties upon different persons; it is not the

same thing for the policeman as it is for the professor; since their places in society are different, their contributions, therefore, are naturally diverse; and it is not the same thing in substance all the time, since the conditions of society change. But its permanent content—the negative and positive aspects of the obligation it imposes—is unchanging. It binds all individuals, whether they are rulers or subjects in a given society. It therefore binds the State which cannot be regarded as transcending the law, since the State is itself nothing more formidable than a particular grouping of men seeking to achieve and intensify social solidarity. Indeed, it may well be argued that the rulers of a society have a special duty in this regard, since their opportunity to contribute to the social end is so much the greater than that of those over whom they rule.

The State, in this conception, is a body of men issuing orders to other men. Their power is a limited power. They have the obligation, by what they do, to contribute to the solidarity of the society. They cannot impose their will—the substance of which we call legislation—if it is hostile to the purpose of the society. In that background, they must respect the equality of men who have an equal claim, despite diversity of aptitude and interest, to the satisfaction of diverse needs. They must recognize man's need to live, and, as a consequence, his title to the means of life. They may not attack those liberties—of speech, of assembly, of property—without which men cannot, as individuals, contribute to social solidarity, unless the latter is harmed by the manner or degree of their expression. They cannot enfold a man within some given class, since this may limit his power to maximize his contribution to social well-being. From the rule of law, in a word, there is imposed upon the State the obligation to assure to each and all of its citizens the means to enable them to contribute all it is in them to give to the fullest realization of social solidarity. It is because of this obligation that the State is entitled to use force for the achievement of its end. For all, moreover, that is essential to this purpose, there should be

constitutional guarantees in the ultimate framework of the State. A flagrant violation of those guarantees gives rise to a right of insurrection in those deprived of their benefits.

In such an attitude, we have all the materials for a full theory of the State. Experience is to suggest, in terms of social solidarity, a rule of right conduct, and the aim of the State is its realization. The State, clearly, is beneath that rule, is, that is to say, bound by law; for, by very definition, it is an instrument and not an end. In those terms, again, Duguit can deny at once the sovereignty and the personality of the State. He denies its sovereignty, in the main, on the ground that its assertion is no longer consonant with the facts; though, indeed, his attitude follows logically from his affirmation that the needs of the rule of law are alone supreme. He denies its personality because the latter postulates mysticism where the facts require reason. The action of the State simply means that certain officials have carried out the order of a minister; there is nothing in that which gives rise to any personality differing from that of those who are concerned in the conception and performance of the order. It is true that the officials have wider powers than the average citizen; but that does not make their acts different in substance. They are men willing an end the validity of which depends upon its conformity with the rule of law.

This denial of sovereignty may be arrived at in another way. Sovereignty is the right of the State to claim obedience for its will as the supreme obligation in society, and that without regard to the substance of its will. It is a capacity to issue orders which, in law, is without limit of any kind. But Duguit first of all denies that there are any such things as rights within society. He insists that duties alone exist. Each of us has certain functions to perform, born of our position in society. The rule of law imposes on us the duty to perform those functions. Sovereignty would mean the unlimited and irresponsible will of those who exercise it; but they are, in fact, limited by the purpose it is to serve. Their power is defined by their function,

and can be no greater. It is, like all power, subject to the rule of law.

What function, then, is the State in fact performing? Its function is to provide for certain public needs which are growing each day more varied, more imperative, and more numerous, as our experience of the requirements of social solidarity becomes richer and more profound. The whole theory of the State, indeed, is contained in the idea of social need. It is the performance by the mass of officials of their special social function—the part assigned to them in the division of labour by which social solidarity is intensified. A statute is simply the legislative settlement of such a function—the determination that some public need shall be served by government in a certain fashion. Administrative acts are simply the fulfilment of the statute —the creation of a special situation corresponding to the social need therein satisfied. Administrative acts are not political in character; that is rather their corruption. They are simply technical operations which, like any other social act, are submitted, for their general validity, to that rule of law whence their necessity is ultimately derived.

In such an aspect, two things are clear: the State is reduced to the level of a private citizen since the activities of each are brought within the scope of an objective law; and, further, there is no distinction between the nature of public and of private law, since each is subject to the criterion of social solidarity. And that reduction necessarily involves the State in a full responsibility for its acts; Duguit was rightly quick to note how the remarkable jurisprudence of the Conseil d'État has extended on every hand the idea of State-responsibility. It is also, as he insisted, a doctrine which makes against authoritarianism. The only justification for any public act is that its result in public good should be commensurate with the force that is involved in its exercise. But that, after all, is ultimately a matter for the private judgement of each one of us; and a real impetus is thus given to the initiative of the private citizen. Room is left for that reservoir of individualism

upon which, in the last resort, so much of the welfare of society depends. No act, in Duguit's view, draws its justification from the fact that it is the result of will merely, or even of a formally competent will. He demands, rather, the research of reason into human needs, and makes the rightness of an act depend upon its agreement with the results of such an inquiry.

Three practical and immediate consequences are obvious in such an attitude. Duguit seems clearly to believe in the virtues of a written constitution; or, at least, he emphasizes that distinction between constitutional and ordinary legislation which is the main element in the debate. The reason for this conclusion really goes back to the central principle in his system; for the written constitution is nothing so much as an attempt to make the rule of law enforcible upon the government. It logically follows, therefore, that he should not merely emphasize the value of the judicial review of executive acts, but should be tempted to seek the extension of that control to the policy of the legislature. Government by the judges would logically, under his system, be the final safeguard, insurrection apart, of the rule of law. He emphasized, lastly, the necessity of readjusting the theory of the State to the new perspective given to it by the growing importance of social groups. It is no longer possible, he has insisted, for a unified direction of society, whether centred in the Council of Ministers in Paris, or the Cabinet in London, to grapple with the issues that confront us. The facts call urgently for decentralization, both of a territorial and functional type.

Duguit nowhere, to my knowledge, has drawn any full picture of the tendency that is emerging; but he seemed to incline to an acceptance of regionalism, on the one side, and, on the other, to an acceptance of that ideal of technical autonomy for each special public utility for which M. Leroy has been so distinguished a sponsor. He seemed also, though not without hesitation, to regard the trade unions as destined one day to form an integral part of a State federalized by functions as well as by regions. He repudiated

with energy the idea of a class-war; and he refused to admit the right to strike in the case of men who are publicly employed. In this aspect, clearly, Duguit was much influenced by the contemplation of feudal society. Class, to him, meant simply a group of men whose functions knit them closely together by reason of their special similarity; and it is the function of such a class, as a unit in relation to the whole structure, by which he was impressed. This tended, perhaps, to give a somewhat static character to his analysis of the social disintegration that confronts us; or, rather, it emphasized more the simple fact of disintegration than the effort of reconstruction.

III

Such, in bare outline, is the anatomy of Duguit's theory of the State. It cannot, of course, do justice either to the subtlety of its argument, or the rich amplitude of its illustrative material. No one can doubt the value of the effort it made to bring juristic speculation about the nature of the State to the realistic basis it encounters in everyday life. But it is, I think, difficult to feel that the results of M. Duguit's analysis are, in fact, what he declares them to be. Its emphasis upon social solidarity as the foundation of juristic thought is, no doubt, a postulate of real value, which properly emphasized the origins of law in social, as distinct from individual, claims. But that postulate does not necessarily result in the scheme of preferences he evolved from them. These are, in fact, no more than his own interpretation of the things he deems desirable in a society like our own. For, if the rule of law is merely a fact, it cannot give rise to a scheme of values. It can only describe a system of social sequences which cannot claim their right to be observed. Once they make that claim they must do so on grounds which he started by expelling from his system. The duty, for instance, in the government of a State to recognize freedom of association, as the claim of men to education, is a judgement that freedom of association promotes social solidarity, that the warning of

the individual mind is an addition to the end society serves. It cannot be said that either of these derives from his rule of law with the clarity he claimed. An aristocrat might well deny the second; an autocrat would certainly deny the first. To convince them would depend upon their acceptance of a philosophy of history which, by its very nature, could have no place in Duguit's scheme of thought.

Nor is that all. M. Duguit's denial of the idea of subjective rights is terminological rather than actual. I have, he says, the duty to contribute all I can to the development of social solidarity. He then proceeds to enumerate the conditions upon which the fullness of my contribution depends. When these are examined they turn out to be a list of the needs which in other systems are termed rights; and the only difference between their character and that discoverable in the classic jurisprudence is that M. Duguit makes them referable to an end outside the individual citizen, while the classical system makes the individual himself an end and, therefore, insists that rights shall cohere in him.

Nor has M. Duguit, as he believed, effectively expelled sovereignty from his system in the juristic sense of the term. He believes as much as Esmein himself that there is, in the State, an unchallengeable source of public authority. For his desire to insist upon the binding force of his rule of law ought to persuade him to submit all State action to the decision of the judges; and the essential difference between Esmein and himself is that whereas Esmein insisted on the supremacy of the legislature, Duguit should transfer that supremacy to the judiciary. American experience of judicial review should have taught him how dubiously this in fact achieves the end he had in view. For the Supreme Court of the United States, to take an essential example, does no more, when it declares a statute unconstitutional, than substitute its view of what the rule of law implies for a different view taken by some legislature responsible for it.

It is true that Duguit admitted a right of insurrection; but it is difficult to feel that he had discovered a juristic

basis for this principle. Rather it seems for him to have been a mere *cri de cœur*, an insistence that if the rule of law is neglected by the governors of a State, their subjects may resist if they can. But I do not think it can be said that Duguit gave us any guidance to the occasion when the right comes into play. Is a citizen, or a group of citizens, entitled to pit his view that the rule of law has been violated whenever they are convinced that is the case? If there are limitations upon their action, in what are they to be discovered? Clearly, the principle cannot be a juristic one unless there is a settled institutional means for its expression; and I do not see that Duguit ever indicated such institutional means. In failing to do so, he laid himself fairly open to the attacks of those critics who urged that his was a doctrine of anarchy. The curious thing is his resentment of the criticism. For, in the realm of objective fact wherein he was seeking to dwell, the certainty of insurrection, if men are denied rights they deem fundamental is in the long run obvious. One cannot, I think, say the principle derives from law. One certainly cannot assess its rightness or wrongness in legal terms upon any principle inherent in Duguit's doctrine. For it is of the essence of that doctrine to deny the criterion of value a place in jurisprudence.

The fact is that Duguit's notion of function will not bear the weight he seeks to make it hold.

'To speak of a norm as obligatory in a juridical sense', he wrote, 'means simply that, at a given moment, . . . if this norm is violated the bulk of the people feels that it is just, according to the feeling for justice that it forms for itself at this moment, that it (the norm) is necessary for the maintenance of social solidarity, that what there is of conscious force in the group intervenes to repress this violation.'[1]

But, clearly, this popular sense of justice may express itself at any moment. It may express itself, for example, in a strike of postal servants, as in 1909. But Duguit himself

[1] *Traité de Droit Constitutionnel*, vol. i, p. 65.

denied the right of postal servants to strike, on the ground that they were bound to maintain the continuity of the public service to which they belonged. Is, then, the norm of 'continuity of service' of higher obligation than the 'popular sense of justice' which has also normative force? What can be the deciding factor between the conflicting obligations except the judgement of the individuals involved? And if they exercise the judgement by striking, in what manner can they be condemned? I do not see that Duguit's principles give us any materials with which to answer that question. What, again, is the duty of an association of ardent Roman Catholics in some given political society whose 'feeling for justice' tells them that they must resist, at all costs, the separation of Church and State as the violation of a norm the observance of which is fundamental to social solidarity? May its resistance to such a separation be described as an 'intervention to repress this violation'? Ought their resistance, on Duguit's principles, to involve their punishment? If it does, is he saying more than his belief that force makes law? And, if he says that, what guarantee does he offer us, except an interpretation of history (the very metaphysics he denies), that the law made by force will, in fact, promote social solidarity?

Duguit himself, I believe, was not unaware of this difficulty. His own enthusiasm for social legislation (typical of his generous nature) seemed to confess some uncertainty as to whether it followed from the postulate of social solidarity. 'Here', he wrote,[1] 'it is in itself powerless; we require also the sentiment of pity for human suffering.' But if the rule of law is powerless without motives not necessarily inherent in its claim to bind the rulers of a State to action, what becomes of the rule of law as the parent of a sense of justice? And what is the obligation of a citizen if the 'sense of justice' some norm imposes on him conflicts with that 'sentiment of pity' which he thought one of the 'finest characteristics of civilised man in the

[1] *Droit Social*, p. 68.

twentieth century' and essential to the realization of the 'whole man' in politics?[1] Are not these metaphysical considerations built upon a view of the ends to be attained by law which are utterly alien from the original postulates of his system?

The truth surely is that one cannot build an effective jurisprudence with the methods Duguit proposed to use. A legal theory of the State which seeks to put upon one side all metaphysical principles must find the justification for the norms it makes not in an end it seeks to serve, but in the source of the norms it makes. For once it postulates an end it is seeking to serve it cannot escape from the need to justify that end in metaphysical terms. These will be present implicitly at every stage of its argument. And the inferences it draws from its own postulate are bound to be coloured by the aims of those who construct the system. Duguit's inferences from the principle of social solidarity were not those which, for example, M. Charles Maurras would have drawn. His denial that the latter's inferences were valid could only have been made upon the basis that history did not confirm the ideals for which M. Maurras stood. But to take his stand upon that argument is, at bottom, to argue for the juridical authority of whatever happens, on the ground that the people's 'sense of justice' has accepted it. Yet Duguit could not himself logically do this, were experience to contradict his own reading of what the 'rule of law' plainly implied, without admitting that the principle of social solidarity gave no clear direction to us of what the norms of objective law should seek to establish.

This may, perhaps, be put in another way. The rule of law, if it is to be effectively binding alike upon the governors and their subjects, must give inescapable indications of the inferences for legislative action that it contains. And there must be, in the State, some positive institution, or institutions, charged with the function of seeing to it that these inferences determine the character of legislation.

[1] *Droit Social*, p. 68.

This institution may, as in the United States, be a Supreme Court, or, as in Great Britain, the King in Parliament. But Duguit was only willing to allow to the Courts the control of administrative action; whence, clearly, and apart from the duty of insurrection, legislative action escapes the rule of law.[1] But there is a further difficulty. No one can seriously claim that the rule of law which arises from the need for social solidarity gives clear directions in any particular instance. Does it, for example, lead to the compulsory recognition of collective bargaining in the relations between capital and labour? Does it involve the abolition of night-work for women in industry? Does it imply the principle of employers' liability? The answer to each of these questions (and to many similar ones) depends upon the view we take of freedom of contract and its place in the modern State. The interpretation, in a word, of the rule of law will vary with the temperament, the interest, the philosophy, of those who are affected by the result; and no one who scrutinizes historic experience can say that there is a common 'feeling for justice' which moves the public mind to an incisive expression of view.

IV

This brings me to a remark upon Duguit's thesis of social solidarity which is, I think, important. At bottom it is one of two things: either it is a criterion of goodness in legislation, in which case differences of interpretation about the facts surround it with a vagueness which is unsatisfactory for the purpose of positive jurisprudence; or, as it becomes when Duguit has drawn from it the inferences he believes it to contain as a programme, it is a body of principles which ought to be realized in law because such realization assists the end the State is intended to serve. In the latter case the theory seems to me indistinguishable from a theory of natural law to which it claims, on

[1] *Droit Constitutionnel* (1907), p. 659. This is perhaps softened down in *Traité*, i, p. 189.

ultimately metaphysical grounds, that positive law ought to conform.

It is as the latter that Duguit himself, I believe, conceived it; and, in this aspect, the criticism of M. Gény, that what is wrong with Duguit's doctrine is its refusal to admit the metaphysic it in fact contains, seems to me well-founded. So regarded, its historic roots, as Esmein saw,[1] are clear. It goes back, as a doctrine, to Royer-Collard, with his refusal to admit the sovereignty of any principle save Reason in public affairs. It argues that either the compulsion of the facts to a conclusion which Reason demands must bind us, or, alternatively, right means no more than the power of the stronger in society to enforce their will. Since it is unwilling to admit the latter conclusion, on the admirable ground that it denudes the idea of right of all meaning, it is driven to think of legality as implying not merely origin in a source of reference which has competence under some constitutional scheme, but as a substance capable of justification in terms of the end which Reason ordains as the object of power.

It is unnecessary for me to point out that this is sound medieval doctrine. It represents the unwillingness of every generous mind to be satisfied with the idea that law is law merely as a command emanating from an authority formally competent to enact it. Exactly as the schoolmen insisted that the validity of positive law consists in its conformity with natural and divine law, so Duguit is emphatic that the validity of positive law depends upon its conformity with the supreme claims of social solidarity. He will not say, as Hobbes was prepared to say, *jus est quod jussum est*; he argues that the substance of the command is vital in deciding its title to allegiance. By so arguing, his theory ceases to be a positive doctrine, independent of its metaphysical assumptions. It becomes a theory of right conduct, alike in governors and governed, the adequacy of which depends, at every stage, upon its

[1] *Éléments de Droit Constitutionnel* (6th ed.), p. 43; cf. my *Authority in the Modern State*, chap. iv.

ability to show that the particular demands of the theory are capable of validation by Reason.

It is on these grounds that I believe Duguit's work to be so much more valuable on its critical than on its constructive side. No one with whose work in French jurisprudence I am acquainted seems to me to have surpassed him in describing the actual processes of the State. He realized, better than any of his contemporaries, that the vast debates of the nineteenth century over the idea of national sovereignty lead us into a jungle of metaphysical hypotheses from which there is no escape. The classic theory of sovereignty seems to me two things. It is, in the first place, the argument that laws are orders of an ultimate political authority behind which we cannot go, because, formally, there is no appeal beyond their jurisdiction; and it is, in the second, a justification of their title to obedience, on the ground that they embody the will of the nation. To the latter hypothesis should be added the philosophic justification that the law of the State should be obeyed, as against any competing claim, on the ground that it represents the best self of each of us, that is, the general will of society.

It was the value of Duguit's work to have emphasized the inadequacy of the second argument; and to have rejected with emphasis the philosophic justification. He saw that the government of a State is simply a body of men issuing orders, and that these, in themselves, have no colour of any kind. Orders of government do not embody the will of the nation, for the simple reason that the nation, as such, has no will. The State, so to say, is a parallelogram of forces in which now one element, now another, prevails. Judgement upon the result cannot be pronounced until the result is known. To say that the government of the State must be obeyed because it is the government, is to argue that obedience is due without regard to the nature of that for which obedience is demanded. And if it be urged that the State represents the best of us, and is entitled to obedience on that ground, the answer surely is

that in historic experience, no such claim is admissible. States err, not merely through inadvertence, but, on occasion, through a deliberate will to do what is incapable of defence on ethical grounds.

In these terms, all of Duguit's criticisms of the classical assumptions seem to me justifiable. As soon, however, as he embarked upon the task of discovering a constructive alternative, he seems to me to have missed the central necessity of his theory. That necessity is a criterion of justice to which the specific commands of positive law must conform. His conception of social solidarity was, in fact, a partial realization of this criterion; but he himself so imperfectly realized the nature of the task upon which he had embarked that he did not give to his constructive views the foundation of which they had stood in need.

That foundation is, at its base, a theory of natural law. French jurists, especially in the last generation, have done notable work in clearing the ground for its adequate formulation. Here, as I think, it will suffice to say that the sooner we seek to revive the effort of the medieval schoolmen, and the great Spanish thinkers of the sixteenth century, the more rapidly we shall arrive at an adequate theory of the State. We shall have, doubtless, to prune it of its theological perspective. We shall need to recognize the relevance of anthropological discovery in a way, and to a degree, they could not have known. But when William of Ockham propounded his famous theory of natural law[1] he seems to me to have indicated the direction in which discovery is most likely to be made. Most modern thinking, especially since Rousseau, seems to me to have misconceived the problem by making natural law a one-sided and partial development of what the great medieval tradition of natural law had in mind. We are coming rapidly to a position where the possibilities of creative adventure are immense; and the more we emphasize the need to interpret the facts about us in economic terms, the more quickly

[1] *Dialog.* pars iii, tr. ii, 1.3, c. 6 in Goldast, *Monarchia*, vol. ii, p. 932.

will the decisive issues be made plain. It is because Duguit brought out the implications of this development in so striking a fashion that he is entitled to our gratitude and our admiration.

THE INSTITUTIONAL THEORY

By W. IVOR JENNINGS

IDEAS are the product of circumstance. They are modified and developed by changing economic and political conditions. The relation between them as of cause and consequence is obscure. It would be a difficult task, therefore, to attempt to explain why the War should have caused an essentially sceptical nation like the French to veer once more to Catholicism. We know too little both of the material circumstances and of the mental conditions which produced it. We know only that it has happened, that French thought is changing once more to the Catholic tradition, and that St. Thomas Aquinas is in the fashion. I do not know the reason; but it is the fact which I must first lay before you in the explanation of the Institutional Theory. Maurice Hauriou first developed that theory some twenty-five years ago in the sixth edition of his *Précis de Droit Administratif*, and in the first edition of his *Principes de Droit Public*.[1] Though it was referred to by most of the later writers on public law, it created no great interest at the time. The *Précis de Droit Administratif* continued its successful career; but that is explained by its supremacy as a study of French administrative law, not by its almost incidental reference to the theory of the Institution. The *Principes de Droit Public* did not reach its second (and last) edition until 1916.

The great popularity of the theory dates from the publication of his article entitled 'La Théorie de l'Institution et de la Fondation' in 1925.[2] Admittedly, it was not quite the same theory. Hauriou's ideas were always in the process of development. Twenty years of thought had altered not only its mode of presentation, but also some of its connotations. Nevertheless, it was in essence the same. And the reason for its popularity after 1925 was, I think,

[1] See especially chapter iii.

[2] *Cahiers de la Nouvelle Journée*, No. 4, pp. 1–45.

partly at least that the minds of those who read it in 1925 were more ready to receive it than the minds of those who read it in 1910. It has been commented upon by all those who have discussed legal theory since 1925. It has been developed in a great volume by Georges Renard entitled *La Théorie de l'Institution*; and that book in its turn has received the signal honour of being almost the only topic discussed by six of the greatest legal philosophers of France in the first number of the *Archives de Philosophie du Droit et de Sociologie Juridique* (1931).

The explanation is, I think, that it is acceptable to modern Catholic modes of thought. I do not say theology, for it is based not upon dogmas, but upon the Catholic rationalism of St. Thomas Aquinas. It is true that there is not a single reference to Thomistic philosophy either in the chapter in the *Principes de Droit Public* or in the article on 'La Théorie de l'Institution et de la Fondation'. But Renard's book is studded with quotations from St. Thomas, and he himself tells us:

'Hauriou was the great forerunner of the restoration of thomism to the philosophy of law; his theory of the institution is nothing more than an audacious contradiction to the theories of "will" which the science of law was later to make its second nature; his books will remain closed to anyone who has not understood that; they will open to their fullest extent only to one who has resolved to swim with the current.'[1]

This is, probably, an explanation *ex post facto*. I do not believe that Hauriou consciously adopted any Thomistic philosophy when he began to formulate the institutional theory. But there is no philosophy so potent as that which lies unexpressed. It is certain that his Catholic beliefs led him the more easily to realize the existence of institutions and of legal systems outside the ambit of the State. A good Catholic is not bound to accept the theory of the

[1] Op. cit., p. xiii; cf. op. cit., p. xv, where it is stated that Hauriou wrote in 1916: 'I must be classed as a Comtist positivist who has become a Catholic positivist—that is, as a Comtist who goes so far as to use the moral, social, and juridical content of the Catholic dogma.'

Institution, nor need a good atheist deny it as based upon superstition. I say only that it comes more readily to one whose philosophy does not turn upon an individual within the State.

There is a second reason for the popularity of the doctrine. Hauriou was Professor of Public Law at Toulouse; Renard is Professor of Public Law at Nancy. Now, there is one problem above all in which public lawyers are interested. They are much concerned with the development of the new administrative organization which modern industrial conditions and the general acceptance of collectivist notions has produced in all civilized countries Public law in the nineteenth century was essentially individualistic. It was concerned with the State on the one hand and with the individual on the other. The State had its organs, but they were collected at the centre: they were not regarded as separate, they were the instruments which the State used, and the public lawyer was concerned rather with the State than with the instruments.

Dicey's *Introduction to the Study of the Law of the Constitution*, for instance, is typical of the old order. Dicey saw on the one side the supremacy of the State—the sovereignty of Parliament—and on the other side the law protecting the individual. His section on the 'Rule of Law' is concerned essentially with the liberty of the subject. The main lines of the book, it will be remembered, were laid down in 1885. It was written under the influence of those who had written on the Revolutions in England, in France, and in America. The Rule of Law is inspired by the ideas expressed in the Declarations of Rights. Dicey's failure to understand the French system of administrative law is significant. He has no concern with administrative authorities: he regards them as appendages of the Crown, or, alternatively, as ordinary subjects. As an active politician, he was compelled to recognize that there was a new body of legal rules growing up. He gives expression to the ideas which they engendered in his later writing in *Law and Opinion in England*. But he did not realize—or

if he did realize it he did not give public expression to his realization—that this enlarged body of law was giving an entirely new twist to the British constitution. The Rule of Law, if it becomes worth stating in the new scheme of things, must be stated very differently.

For the 'period of collectivism', as Dicey called it,[1] enlarged the powers and duties of public authorities and created a host of new public authorities. The public lawyer now is concerned essentially with administrative law. He has to deal with government departments, independent statutory authorities, local authorities, and public utility companies. Each of these groups has its own rules of organization, its own powers and duties, its peculiar relations with other public authorities and with ordinary citizens. Public law, that is to say, is essentially concerned with *institutions*.

We may perhaps wonder what would have happened to administrative law in England if Dicey in, say, 1910 had entirely rewritten his book on constitutional law, and had given his great authority to the explanation of the new conditions. Hauriou was equally conservative—I have not forgotten that Dicey was in politics a Liberal Unionist, but that means conservatism with such leaders as Hartington and Goschen—but, unlike Dicey, he had been compelled to apply his mind to the new conditions. He, indeed, had more to do with the later development of administrative law than any. He it was, through his notes to the reports of the Conseil d'État in Sirey,[2] who enabled the old principle of the separation of powers to be developed in a manner suitable to the new administrative hierarchy. If as a public lawyer he had to concern himself with this order of institutions, it is clear that in what we should call his jurisprudence—though jurisprudence and public law are in this sense indistinguishable—he was bound to do the same. Every public lawyer, indeed, in developing his theory, can no longer regard his State as a single entity, a *personne*

[1] *Law and Opinion.*

[2] Now collected in *Jurisprudence Administrative* (1930), 3 vols.

morale standing out boldly and alone to exercise its supremacy against its individual citizens. It is, perhaps, a *personne morale*, but only because it is the greatest of the institutions which exercise authority within its territorial limits. It does not act by itself, it does not even act directly through individual officers: it acts through institutions. Nor is the citizen alone. He has federated himself. Trade unions, employers' associations, trade protection societies, propaganda associations, have to be dealt with as units. The State is an aggregate of institutions. It has to control through its institutions not only ordinary citizens, but institutions as well.

A theory of institutions, therefore, will be a juridical instrument which suits modern political conditions. It will meet the demand of the public lawyer for general ideas to fit the problems with which he is faced. And public law, be it noted, is gradually eating up private law. Industrial law is being controlled by administrative organs and is at the same time eating into the law of obligations. Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laisser-faire* has been abandoned, the public lawyer is ousting the private lawyer, and the rights and duties of institutions are superseding the ordinary rights and duties of private citizens.

A public lawyer must, therefore, develop a theory of institutions. What sort of theory will a Catholic public lawyer adopt? You will realize that, like Professor Laski, but for different reasons, he will deny at once any necessary supremacy in the State. The State is a great institution, but there are institutions other than the State. There is the Church, for instance; there is the institution which is the particular mission of the Church to protect, the family; and there are all those charitable institutions whose control is in the very forefront of the battle-ground between the Church and the secular State. Moreover, the Catholic lawyer is likely to believe in natural law. Catholic theology,

and therefore Catholic philosophy, must believe in ultimate Truth, in ultimate Good, in the ultimate Good that is God. It does not follow that ultimate Truth is attainable by an exercise of reason: it might be attainable only by faith. But that is where the Thomistic philosophy becomes important. Human reason, though necessarily defective, may make some attempt to reach truth. The function of faith is to reveal all those things which God wants revealed, and which God has not revealed through reason. Reason can thus operate only within the limits set by faith. If the Church says that something is wrong, then it is wrong, and any reasoning which proves it to be right is demonstrated to be false. But within those limits reason not only may operate but must operate: for reason, too, comes from God.[1] As Professor Renard has said:

'The help given by beliefs to philosophy in general, and to the philosophy of law in particular, consists in suggesting hypotheses to it. If the hypothesis is capable of rational verification, the belief is incorporated into the inheritance of philosophy: if the hypothesis cannot be verified, the belief rests on the plane of faith.'[2]

Again I am not asserting that natural law is a Catholic dogma, but only that a Catholic accepts the doctrine readily. Such an uncompromising rationalist as Professor Morris Cohen asserts its necessity,[3] and even the Hegelians do not necessarily deny it.[4] Bentham is the great English antagonist of the law of nature, but his 'principle of utility' is an admirable basis for a rationalist natural law. Sir Frederick Pollock has indeed pointed out[5] that William of Ockham used the Benthamite principle under the name of *communis utilitas* as the foundation of natural law; and that Bentham himself uses natural law to establish certain

[1] Gilson, *The Philosophy of St. Thomas Aquinas*, chap. iii; cf. A. Piot, *Droit Naturel et Réalisme*, pp. 58–64.

[2] *Le Droit, l'Ordre et la Raison*, p. 182.

[3] *Reason and Nature*, pp. 401–26.

[4] T. H. Green, *Principles of Political Obligation* (1927), pp. 33–8; Bosanquet, *The Philosophical Theory of the State*, pp. 10–15.

[5] *History of the Science of Politics*, p. 119.

principles of his Civil Code.[1] Austin, as is well known, equates the principle of utility with natural law and the law of God.[2] It is nevertheless true that the whole doctrine is more popular in the Catholic countries than in Protestant countries.

The word 'institution', in English as in French, means something which has been established, set up, instituted, and which has a continuing existence. The London School of Economics is an institution, so is the British Broadcasting Corporation, the Ministry of Health, a local authority, the London Hospital, the Imperial Tobacco Company, the National Union of Railwaymen, and the University of London Law Society. These are all associations, or, if I may use the phrase, corporated or unincorporated corporations. They are examples of what Hauriou called[3] person-institutions (*institutions-personnes*). There are also, according to Hauriou, thing-institutions (*institutions-choses*), such as marriage, the National Debt, the Standing Orders of the House of Commons. But Hauriou actually developed only the theory of person-institutions, and Renard denies that there are thing-institutions. We shall be wise, therefore, to limit our consideration to that type of institution.

You will see that the theory of institutions on this side of it is a new corporation theory. It is not a theory of corporate *personality*, but just a theory of corporations. It asserts the reality of institutions. And let me remind you that there is a substantial difference between them. It seems rather obvious, but it is not always made plain, that the denial of the personality of an association does not necessarily deny its reality. The extreme fiction theory assumes that a corporation consists only of the persons who form it. That may be so: but it must be admitted that it consists *for the time being* of those persons who belong to

[1] *History of the Science of Politics*, p. 121.

[2] *Jurisprudence* (Campbell's edition), i, pp. 179 et seq.; cf. Sir Henry Maine, *Early Institutions*, p. 369.

[3] 'Théorie de l'Institution et de la Fondation', p. 1.

it, *acting in a certain way*—that is, possessing certain relations among themselves. The persons change, their methods of operation alter, but the thing itself continues. To a layman it seems absurd to say that there is no such entity as the London School of Economics. Yet the lawyer, in carrying out his fiction theory to its conclusion, tends to assert that there is not, that there are only the persons who for the time being belong to it.

The London School of Economics, says the theory of the institution, is a reality of its own. It has a character of its own, a tradition which is unique. It does not deny that it may not change with the people who form it for the time being. As their ideas and behaviour alter, so the character of the institution may be modified. But the institution continues, and affects the character or at least the acts of those who belong to it.

Institutions, then, are real. What are the characteristics of their reality? Hauriou had much ado to combat on the one side theories of will which owe their origin to Rousseau and their later development to Kant and Hegel, and on the other side the purely sociological theories which sprang from Comte and developed through Durkheim to Duguit. We need not stop over this discussion. Rousseau was the prophet of revolution, and his ideas gained no currency among English lawyers. Hegelian theories profoundly affected political thought in England. But the mass of lawyers in England was unaffected by the intellectual stimulus which was evidenced by the French Revolution, the Revolution of 1848, and the rise of European nationalism. Nor has the struggle between objectivism and subjectivism affected English jurisprudence. English lawyers have been the most objective of objectivists, and for them Duguit was a metaphysician of the most extreme kind. To attempt to rebut these theories would therefore be to flog a horse which has never been foaled.

This enables us to proceed at once to the study of the institution.

'An institution', says Hauriou, 'is an idea of an undertaking

or of an enterprise which is realized and which persists juridically in a social environment; for the realization of this idea, an authority is constituted which procures organs for itself; and in addition, among the members of the social group interested in the realization of the idea, there are produced manifestations of communion directed by the organs of authority and regulated by a definite procedure.'[1]

More shortly, it is put by Renard as 'the communion of men in an idea'.[2] The essence of the institution, you see, is the *idea*. 'For juridical science', says Renard, 'it is not only men who count; there are also ideas.'[3]

Rather more than one hundred years ago, a group of men interested in education realized that an institution of university status was sadly needed in London. They spread the idea around, and gradually there arose a substantial 'communion of men' created for the purpose. So they established an authority, received the sanction of the appropriate national department, and with that sanction indicated how the authority was to proceed. So there was founded University College, London. Other men have come to exercise the authority, new developments have expanded the original idea. The idea has, indeed, come to be part of a larger idea. Other authorities have been established with similar aims. University College is but one of several such institutions, and together they form the University of London. Yet the essence of the idea which produced the foundation of University College remains. 'The river is always the same,' says Renard,[4] 'but the same water does not flow between its banks.'

Our example drawn from the University of London shows that there are institutions within institutions. Renard, as

[1] The translation is not easy. In the original it is: 'Une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social; pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes; d'autre part, entre les membres du groupe social interessé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et reglées par des procédures.'—'La Théorie de l'Institution et de la Fondation', p. 10; cf. the translation in Hallis, *Corporate Personality*, p. 221.

[2] *Théorie de l'Institution*, p. 95. [3] Op. cit., p. 92. [4] Op. cit., p. 112.

a public lawyer, naturally places great emphasis upon that institution which we call the State. It is probable indeed that the task of explaining what the State is, first turned his mind to the institutional theory. For the State, he tells us,[1] is the torment of teachers of constitutional law. But there are other institutions in public law besides the State. The State, he asserts in the same place, is founded upon the nation, and is itself the support of a crowd of other institutions, of which some emanate from it, but of which a great many are founded without it and perhaps before it, being but tardily incorporated by it. There are, for example, local authorities and colonies. There may, indeed, be institutions of public law which are founded against the State, such as trade unions of civil servants.

There are, he says,[2] three ideas behind the nation, and of them two are constant and the third varies according to the nation. First, attachment to the soil, secondly, what he calls the urge (I do not see how else I can translate *vocation*) to independence, and thirdly, something peculiar to each nation, a 'form' in the philosophical sense of that word, a 'family atmosphere' which differs among the human race and binds to each other the members of the same nation. The nation may not be recognized by law, it need not have a legal personality: but in France, at least, the Revolution has placed upon its head the crown of sovereignty: and we ourselves cannot but remember that Article 2 of the Constitution of the Irish Free State affirms that 'all powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland'. In both cases a particular political philosophy is embodied in the law—but then all public law is applied politics.

For most purposes the State is the nation: but, says Renard,[3] there are at least two other ideas in the State. There is the 'governmental idea' which is constant; and there is the 'political idea' which is variable. The governmental idea is the idea of an organization—the form or

[1] Op. cit., p. 152. [2] Op. cit., p. 155. [3] Op cit., p. 157.

constitution of the State; while the political idea is the particular end at which the State is aiming for the time being—it may be to enable the State to adapt itself to the national interest, it may be to preserve the present social and economic system, or it may be a policy of domination.

The State and the nation are among the most important of institutions. And so great, says Renard, has been the emphasis upon the State that we tend to restrict the term 'constitutional law' to describe the law relating to the constitution of the State. But there are other institutions, and they too have constitutions. Consequently (since, I suppose, law is not the product of any given institution but regulates them all) constitutional law ought to deal with the constitutions of all institutions. Constitutional law, that is to say, deals with the constitution of institutions. Teachers of constitutional law ought to teach how the subjects of law are constituted:

'There are subjects of law which have a physiological, psychological and moral structure to which we add legal capacity—reasoning beings; there are others whose structure is purely juridical, the family and the State no doubt, but also associations, trade unions, limited companies, charities, and other cultural, scientific and scholastic organizations: all these beings must be constituted before they enter into juridical life; constitutional law ought to comprise the whole of this domain.'

This analysis of the nature of the State and its relation to the nation is an excellent example of the institutional method. The Institutional Theory is an analysis of society. It explains why society is organized in a certain way: Renard's book is in fact published with the subtitle 'An Essay in Juridical Ontology'. In that respect, therefore, it has some analogies with the pluralist theories which are so popular in England, chiefly under the influence of Professor Laski. Professor Laski's aim, however, is not merely to examine society, but to discuss how society ought to operate. If Society is organized into institutions, then the relations between institutions have to be determined. Political philosophy must be able to tell us when men must

act as individuals, and when they must act as members of one institution rather than of another. It must tell us, for example, when an individual may disobey the law laid down by the organs of a State, when he may obey his trade union and defy the State, and when he may obey the State and defy his Church. A lawyer, however, tends to emphasize the form rather than the object. Renard has no immediate answer if he be asked what happens when the 'idea' of one institution, such as the State, conflicts with the idea of another institution, such as a trade union. He might reply that one of the ideas of the State is public order, and that the State would therefore be justified in suppressing the trade union; but if this is the answer it could not apply if the second institution were the Church. No doubt a reply would be immediately forthcoming, for the question is covered by one of the articles of Catholic dogma, but it would hardly receive approval from one who was not a member of the second institution.

The Institutional Theory as a juridical theory does not pretend to answer these questions. It is a sociological theory. When Austin followed Hobbes and Bentham in defining a State as composed of a sovereign and subjects, he did not necessarily imply that the subject ought to obey the sovereign; he asserted only that the subjects habitually obeyed the sovereign. So with this theory: society is organized into institutions, each institution is carrying out its idea, and a conflict between ideas is not directly contemplated; perhaps this question is to be left to the second and non-juridical volume of the book.

You will have noticed that so far I have said nothing about a theory of law. The reason is that neither Hauriou nor Renard has elaborated such a theory. They do not say what they mean by law because they are concerned to examine the institution with which law deals. I think, however, that there is a theory of law implied, just as Austin's theory of sovereignty implies a theory of law. And difficult though the task is, I will attempt to deduce from the general ideas of the theory of institutions and the

occasional suggestions which Renard throws out, what I conceive that theory to be.

It is, in the first place, as I have said already, a theory of natural law. There are and there must be rules which people obey and must obey not because they are morally bound to obey, but because of man's intrinsic nature and the nature of the society which has developed in consequence of that nature. There is, that is to say, a distinction between morals and natural law, and another distinction between natural law and enacted law. The latter distinction is difficult to express in English, but it is easily made in French by contrasting *droit* and *loi*. A jurist who believes in natural law includes it in *droit* and does not include it in *loi*. Renard, for instance, can distinguish between *juridicité* and *légalité*. Constitutional law, therefore, contains all the principles relating to the formation and organization of institutions which can be deduced from the nature of man and the nature of society: but the constitutional laws of France are the enactments of the *Assemblées Constituantes*.

Thus, there is a general law which applies throughout the world. But every institution is the seat of a legal system: and, indeed, the general law applicable to the whole world is only the law of that supreme institution which is called humanity. An individual is therefore subject to as many systems of law as there are institutions to which he belongs. A civil servant, for instance, is at once a man, a citizen, and an administrator: thus he is subject at one and the same time to the law which regulates humanity, to the civil law, and to administrative law. Renard particularly emphasizes this case, because the French system does make clear the distinction between the civil law and the administrative law. But whether any particular legal system admits the distinction or not, it exists. In the same way, a member of a club is governed by the law of the club and by the law of the State.

All these legal systems, as I understand the theory, arise with the institutions with which they are connected. It is

not the State which creates the law, nor the law which creates the State: they arise simultaneously by the act of foundation, and both go on developing together, working out the idea which is behind the State. Each of the systems is a part of the general system of natural law. But within a State there is also a set of rules which we commonly call law, the product of legislation, of judicial decision, or of custom: what explanation are we to give of this? For Renard, these rules are examples of what French lawyers call 'juridical acts'; and, in Renard's own words, 'If a man has wished to produce a juridical effect, and this wish is not contrary to natural law, that suffices for the production of the juridical effect; his act attaches to the juridical order; it is a juridical act'.[1] Thus, a juridical act is an act which produces a legal situation. Now, there are many kinds of such acts. Among them are rules of all sorts: the legislature produces a juridical act by the process of legislation; an administrator produces a juridical act by his administrative determination; the judge produces a juridical act by his judicial decision; two or more individuals produce a juridical act by their contract; a testator produces a juridical act by his will. These are all rules of the same kind, though produced differently. They are valid provided that they are not contrary to natural law.

These rules are necessary owing to the peculiar composition of the institution within which they are produced. If the members of the institution have complete confidence in each other, there is no need of rules, for they will do what is desirable without such rules. The rules are necessary to limit the actions of individuals where they cannot be trusted. There are few rules within the normal family; and there are few rules, so Renard tells us, within the Catholic Church. These institutions have a particularly 'intimate' character. There are no such intimate relations within the State and most other institutions; there is less confidence between the members, and rules are prescribed for their obedience.

[1] *Théorie de l'Institution*, p. 360.

The members of the institution may, of course, be institutions. There are many institutions, for instance, within a State. Renard definitely says that contracts and testaments may create institutions. For any contract or testament may create a new subject of law (i.e. natural law) which is nothing else than 'an idea detached and emancipated from the person of him or the persons of them who conceived it, and integrated in a disposition of ways and means suitable for prolonging its existence and for perpetuating its development'—that is, an institution.[1] There seems, indeed, to be no reason why other rules should not create institutions; but on this point Renard is not wholly consistent. He asserts elsewhere that juridical acts may be divided into three classes: the contract, the law (*loi*), and the foundation (i.e. the act which creates the institution).[2] The reason is that he finds a difference between, for example, a contract which merely creates a situation between two individuals and a contract (such as a contract preliminary to the formation of a company or a partnership agreement) which creates a perpetuating idea. Similarly, though he does not deal with this branch of the subject, he would distinguish between legislation providing ordinary rights and duties and legislation setting up, for instance, a municipality.

Thus, legislation and the other forms of positive law are the product of will: and the wills are those of the persons who form the appropriate organ of the institution. The law of England, for instance, consists of the rules enunciated by Parliament and by the judges, because we have no confidence in each other, and in order that the idea of the institution which we call the United Kingdom may be carried out, we have set up these subsidiary institutions to make rules. The rules are valid so far as they are consistent with the idea of that institution: and that institution itself is but a member of the greater institution which we call the international community, the institutionalized humanity. Considering humanity and the nature of the institu-

[1] *Théorie de l'Institution*, p. 107. [2] Op. cit., p. 90.

tionalized society which it has developed, we can find rules of natural law which determine the validity of all other rules, including among them the particular rules of the law of England.

If this be so, the theory does not help us to solve most of those familiar problems with which jurisprudence is normally concerned in England. Is the rule law before or after it is enunciated by Parliament? Is the law prescribed by Parliament, or is it the law which gives Parliament authority to make other law? When, if ever, is a custom law? Personally, I do not think that this is any defect in the theory. These questions do nothing but play upon words. They depend entirely upon the definition of law: and law has no definition except in a particular context. No word, as Bentham pointed out long ago, means anything by itself. When I say that the law gives Parliament power to make law, I do not mean quite the same thing as when I say that the judges are bound by the law. What I really mean in the first clause is that people normally feel compelled to do what Parliament tells them to do; and in the second I mean that I can predict with a fair prospect of success some of the decisions which judges make when disputes are brought before them. If I use the term 'law', I am under the obligation of defining it. But my definition satisfies my own use of it, it is not binding on others. If my definition of the word leads me to refuse to include international law within its terms, I cannot say that 'international law is not law': I can say only, 'international law is not law as I define it'. Nor does it follow that because I use the word in two different places I necessarily have the same meaning for it in both places. In fact the task which many writers on jurisprudence attempt to fulfil in defining law is a futile one. They may assert that in the interests of science a fixed meaning ought to be attributed to the word, and they may suggest that fixed meaning. But they are then inventing a meaning for the word, not determining what meaning it already possesses.

The task of the theory of law is not definition. It is to

find out the means by which certain specified rules of law operate; and, if one believes that there is no distinction between the theory and the philosophy of law, this means to discover the ends which a system of rules ought to serve. It is on this basis, if at all, that the Institutional Theory must be criticized.

The real criticism of the Institutional Theory, I think, is that it is a confusion of method. To say that society is organized in institutions is a legitimate use of the sociological method. To say that society ought to be organized in institutions is a legitimate application of the philosophical method. The doctrine of natural law is an excellent application of the philosophical method, though it may be questioned whether the use of the word 'law' does not lead to more confusion of thought than it prevents. But if it is binding, it is binding because reason indicates that it must be binding, not because scientific investigation shows that it is commonly regarded as binding. The natural law of the Institutional Theory is a rational law found according to the principles of Thomistic philosophy. But the theory of institutions itself is a theory of the way in which social life is organized: it is a generalization of what are regarded as actual facts. I have grave doubts—though I am no sociologist and my doubts indicate my own ignorance—whether there can be any sociological theory of institutions which is not psychological. We can perhaps say that men do form institutions, but we cannot explain why they do it, and above all we cannot speak of 'communion in an idea' until we study crowd psychology. The Theory of Institutions, that is to say, can only be a theory of social psychology.

Or we can give a philosophical explanation of the fact of the formation of institutions, and urge in consequence what the relations between men and between institutions should be. This is nothing more than the pluralist theory of the State; and it secures no greater validity than its distinguished supporters in this country and elsewhere had given to it before the appearance of Renard's book. The

real value of Renard's work consists partly in its renewed emphasis upon the disappearance of individualistic law everywhere except where, as in England, judges retain their individualistic views, and partly in the numerous incidental but fruitful comments which the author almost casually throws out. And it never does us harm to be told repeatedly that the State is only one among institutions, and that there are rules to obey besides those which the State sanctions.

ROSCOE POUND

By SIR MAURICE SHELDON AMOS, K.C.

I DO not think that I need offer any apology for the subject which I have chosen for my lecture to-day. But although I offer no apology, I may, by way of preface, advance some of the reasons which appear to me to justify my inviting your attention to the teaching of the very distinguished head of the Harvard Law School. Of these reasons I shall, of course, hope to show, in the course of my lecture, that the most persuasive are to be found in the stimulating character of Dean Pound's writings. But my subject is still, I am happy to say, in the prime of life; he is, we may hope, far from being relegated to the shelf of the classics; and since he is still one of the live forces in the world, it is not yet possible to award to him a definitely ascertained place in the history of legal thought in the English-speaking world. That when the time comes to cast up the accounts of the present generation his place in the balance sheet will be a conspicuous one, I have little doubt. Mr. Justice Holmes, no mean judge of human values, has said of him that 'Pound is a uniquity'; but whether future historians will describe him as a great forerunner, as marking a turning-point in legal progress, an *auspicium melioris aevi*, or as a voice crying in the wilderness, it is yet not possible for us to say. But though my subject suffers from the disadvantage of being a contemporary, he possesses two attributes which may justly stimulate your intellectual appetite: he is an American; and he is one of the leading figures in the world of the American law schools.

American affairs, the evolution of ideas, of moral, social, economic, and legal institutions in that country must always be matters of the highest interest to lawyers in this country. However much you may emphasize the differences between our two nations, arising from the wide divergencies in physical circumstances, and in the racial

composition of the populations, the fact remains that the stock of things, both good and less good, both enlightened and less enlightened which, in common, we take for granted, is very great; and the things we take for granted form the foundation of our social life. But wide and diversified as is the ground of common assumption uniting England and America, it is in no department of affairs so marked as in the law; and for that reason the experiments made, the experience acquired, the course of speculation, the developments of doctrine, in the legal life of America must always, for the English lawyer, be objects of the liveliest interest and instructional value. It is, I venture to think, a matter for regret that so little is done to provide and to facilitate our acquaintance here in England with what is going on in the American legal world. American books are hard to come by; even the British Museum does not take in the *Green Bag*; and I have seen no reference in *The Times* to the extremely important Bill, which, according to my chance information, has recently passed both Houses of Congress, strictly limiting the resort to injunctions in public disputes, and requiring all proceedings for breaches of injunctions to be tried by jury.

There exist in the United States two organs of legal life to which we in this country have not yet developed equally influential parallels: they are the Bar Association and the great law schools. It would be inappropriate for me to-day, even if I possessed the necessary knowledge, to dilate upon the Bar Association; it must suffice to say that it is an organization of the whole legal profession, which, far from confining itself to questions of legal etiquette and professional discipline, regards itself as having a national responsibility in matters of legislation, and maintains numerous standing sub-committees for the purpose of studying various problems of law-reform. But this is a digression.

I am getting nearer to my main subject when I speak of the great American law schools, Harvard, Yale, Columbia, Princeton, Chicago, and many others of lesser fame. I do

not need to dilate to you upon the prestige of these great institutions, which have brought the academic study of the law in America to occupy a place in the national life comparable with that of the great law faculties of Paris, Berlin, and Rome. It would be interesting to discuss the question why the Common Law has made such a place for itself in the American universities, while the mother country has lagged behind. The question is important; for I am persuaded that without great law schools, legal thought and legal progress are alike deprived of an almost essential spring of vitality. As for the explanation of the American development, two causes suggest themselves; one is the absence in America of the rival sources of prestige offered to ambitious youth in England by the traditional studies of the older universities; the other is the undivided character of the legal profession. But whatever may be the causes which have favoured their growth, it is an undoubted fact that the American law schools are most important factors in the national life. And I venture to submit for your consideration the proposition that one of the chief functions of a law school is to produce law professors.

In France, Germany, and Italy, as you are doubtless aware, the professors of law in the universities hold a rank of unsurpassed authority in the profession of the law, a tradition, which, as Pound suggests, seems to go back to the Roman *jurisprudentes*; and owing to somewhat similar causes, including on the one hand the public demand for legal education, and on the other the relatively modest status of the greater number of the very numerous courts of law, a similar state of things is tending to come about in America; and the position has already been reached in which it was possible, a few years ago, for Mr. Justice Stone to be appointed directly from the Columbia Law Faculty to the Supreme Court Bench, and for the eponymous hero of this lecture himself to be regarded as the only serious rival to Judge Cardozo for the seat on the same august bench recently relinquished by Mr. Justice O. W. Holmes. To my mind this evolution in the status and prestige of

academic law is a matter of the happiest augury, and it is much to be hoped that the contagion of the American example will in due course extend to this country. For of one thing I am persuaded, namely that in the English-speaking world the profession and administration of the law suffers and has long suffered from the overweening and unbalanced emphasis placed upon litigation. Just as, with the progress of knowledge, medicine is turning its attention from the art of curing to the science of prevention and the problems of public health, so it is much to be desired that the legal profession should cease to permit litigation to monopolize its field of vision, to the extent to which it does so at present, and should realize its responsibility for legislation, for the criticism of existing laws, and for the investigation of present needs which are the indispensable instruments of progress. In organizing itself for this neglected but capital function the legal profession must, I am convinced, learn to rely in an ever-increasing degree, as it does on the Continent, and as it is coming to do in America, upon the scientific training and critical attitude of the professor of law. It is a significant circumstance that when, some ten years ago, the citizens of Cleveland, Ohio, awoke to the fact that the chief magistrate of their city had been convicted of perjury in a capital case, and that many other concordant phenomena of criminal justice in their midst appeared to invite investigation and report, they addressed themselves neither to the State government, nor to the Federal authorities, but to the Dean of the Harvard Law School. The searching inquiry which Dean Pound undertook, in collaboration with Professor Felix Frankfurter, is described in a remarkable book, *Criminal Justice in Cleveland*, a book which is full of lessons for the legislator and the administrator. Which brings me, after what I hope you will not think too long a preface, to the immediate subject of my lecture.

Roscoe Pound was born at Lincoln, Nebraska, of old New Jersey Quaker stock, in the year 1870. After some experience as a judge in his native State, and after some

twenty years as professor of law in several Western Universities, and finally at Harvard, he became Dean of the Harvard Law School in 1916.

Pound's published writings are very numerous. It must be mentioned that his first book was not on a legal subject, but on botany; and you will find it in the British Museum Catalogue under the title of the *Phytogeography of Nebraska.* His first paper on a legal subject, entitled 'Dogs and the Law', appeared in the *Green Bag* in 1896. Since then he has been a prolific contributor to legal and other learned periodicals, the variety of which affords an impressive illustration of the amount of energy devoted in America at the present day to the serious debate of problems of law and government. Pound's scattered writings bear such headings as *The Need for a School of Sociological Jurisprudence, The Scope and Purpose of Sociological Jurisprudence, Social Problems and the Court, Justice According to Law, A Theory of Social Interests, The Decadence of Equity, Executive Justice, Law and the People.* These titles are by themselves sufficient to convey some idea of the writer's general attitude towards the problems of jurisprudence. Pound's principal works in book form, none of which are very long, are his *Spirit of the Common Law, Interpretations of Legal History*—being a lecture delivered at Cambridge in 1922—*An Introduction to the Philosophy of Law, Law and Morals, Criminal Justice in America,* and the report on *Criminal Justice in Cleveland* to which I have already referred.

I think that the best method for me to pursue in endeavouring to place before you the essence of Dean Pound's teaching in Jurisprudence—for I must of necessity leave on one side his discussions of particular topics in the law—is to speak, as it were, as his unauthorized agent. The brief which I thus presumptuously arrogate to myself is inscribed, 'Sociological Jurisprudence versus the Metaphysical, Analytical, and History Schools *et omnes alii*'.

Our first proposition then is that *Jurisprudence cuts ice.* Law is made by beings endowed with consciousness, and

what these beings think about law affects the kind of law they make. Lord Mansfield, living in an age which still believed that, except when hampered by statute, the law of England is what it ought to be, that is to say, conformable to natural justice, decided, in 1786, as a *res nova*, in *Bize* v. *Dickinson*,[1] that the plaintiff, an insurance broker, who had paid to the defendant, a bankrupt underwriter, certain premiums, without realizing that he was entitled to deduct claims payable under the policies, might recover the amount of those claims as a preferred debt, although his error was a mistake of law.

Consider, as a contrast, the decision of the Court of Appeal in *Baylis* v. *The Bishop of London*,[2] in 1913. In this case the bishop had sequestrated the temporalities of a bankrupt incumbent. Owing to a mistake of fact, certain sums had been paid to the sequestrator by the plaintiff as commuted tithe-rent-charge, which sums were not in fact due: these moneys had been paid over by the sequestrator to the incumbent's trustee in bankruptcy. Action being brought against the bishop for money had and received, the question arose whether he was in the position of an agent who, before action brought, has paid over to his principal, or whether he was himself the principal. The Court of Appeal held that he was himself the principal, and must repay. Lord Justice Farwell observed that in his opinion 'it is impossible for us now to create any new doctrine of Common Law, and the cases show that the defence that the defendant has parted with the money before action brought is confined to cases where he was an agent and has paid it over to his principal'; while Lord Justice Hamilton remarked that 'whatever may have been the case 146 years ago, we are not free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man"'. Here we find jurisprudence undoubtedly cutting ice, and in a very different manner from Lord Mansfield. The informing spirit is now that of the

[1] (1786) T.R. 285.

[2] [1913] 1 Ch. 127.

analytical school, which, in reaction from the natural law jurisprudence of the eighteenth century, minimizes to the utmost the legislative function of the judge, looks for new matter only to the explicit command of the Sovereign, and restricts interpretation to a purely logical process.

The view which we propound is that general views of jurisprudence, of the nature, sources, and place of law, exercise, through their effect upon the general outlook of the legal profession, and particularly of the judges, a commanding influence upon the course of development of the law from generation to generation. This view, we find, comes into conflict with two principal types of opponents. They may, for the present purpose, be distinguished as the *Necessitarian School* and the *Separation of Powers School.* Of course we, on our side, maintain that however eagerly our opponents may insist that the views on jurisprudence which at any time govern the minds of the legal profession either cannot or ought not to guide the course of legal development, it is nevertheless the fact that their regrettable opinions have practical consequences. A man who, outside the lecture-room, disbelieves in Free Will, is unlikely to behave like a man who thinks himself a free agent.

What I have called the *Separation of Powers School,* which may be identified with the *Austinian* or *Analytical School,* does not deny that it would be possible for the judges to take upon themselves to develop the law in whatever direction their appreciation of the needs of the community may dictate, but that it would be very improper for them to do so. It is their business to interpret the commands of the Sovereign; these commands are conveyed in two forms, Common Law and Statute, for neither of which are they responsible, and with the merits, demerits, inadequacies, or redundancies of neither of which is it their business to concern themselves. In interpreting they should confine themselves, on pain of committing acts of *ultra vires*, to a coldly syllogistic method.

On this type of doctrine our comment is twofold; in the

first place it is not true that judges can or do confine themselves to strictly formal methods of reasoning; they must and do mould the law. The very word 'interpretation' is *camouflage*; as Professor Gray has said:

'The difficulties of so-called interpretation arise when the legislator had no meaning at all; when the question which is raised on the Statute never occurred to it; when what the judges have to do, is not to determine what the legislature did mean on a point which was present to its mind, but to guess what it *would* have intended on a point *not* present to its mind, had the point been present.'

And our second comment is that whenever the spirit of *strictum jus* becomes too dominant the community rebels, and creates new organs for the individualization of justice, such as the jurisdiction of the Roman praetor, that of the English Chancellor, or, in our own day, both in England and in America, the Administrative Commission.

It is permissible to say of the analytical school that attaching, as they do, 'cardinal importance to the predictability of the law', 'justice in concrete cases ceases to be their aim', and it is pertinent to remember that the chief founder of the school, John Austin, was a Real-Property lawyer; for a certain inhuman strictness, a readiness to sacrifice everything on the altar of logical precision, are less inappropriate in the field of property than they are in other regions of the law, such as contract, tort, and the criminal law.

The other contingent of our adversaries, which I have called the contingent of the *Necessitarians*, does not confine itself to teaching that conscious law-making is wrong when practised by judges, and outside the view of legal science when practised by sovereign legislators, but denies the possibility, in the long run, and on any significant scale, of any conscious rational law-making at all. Law can do little more, they say, than tread in the mighty footprints of ineluctable necessity.

This type of doctrine takes many forms, which shade into one another; they have a common inspiration in the

Will to Believe that the course of human affairs, and in particular the evolution of law, is as simple and as readily susceptible of explanation and forecast in terms of simple principles as was believed, in the nineteenth century, to be the case for biological species and the heavenly bodies. It is sufficient for the present purpose to distinguish in this philosophy the *Historical School* and the *Economic School.*

The fundamental conception of the Historical School is that law has a life of its own, a life which springs from and is nourished by the subconscious mind of the people; and by *the people* is meant preferably a race, but in default of a race, then a nation. While for the analysts the typical law is a *statute*, for the historians it is a *custom*; the historians look to the *past*, regard law as resting on *social pressure*, and are *Hegelians* in philosophical temperament, while the analysts look to the *present*, regard law as resting on *force*, and are by bias *utilitarians*. The historians look with academic complacency upon the parallel evolution of law and morals; the analysts turn upon the distinction between right and wrong the cold eye of professional indifference. The Historical School 'taught us to think that growth must inevitably follow lines which might be discovered in the Year Books'. A typical example of this attitude is to be found in Lord Justice Fry's very erudite judgement in *Cochrane* v. *Moore*,[1] in which, in order to reach the conclusion that delivery was necessary to complete the gift of a quarter share in a racehorse, he invoked the authority of Justinian, Bracton, Britton, Fleta, and the *Mirror of Justices*, observing, though without complaint, that in these researches the Court had not had the assistance of counsel.[2]

A conspicuous characteristic of the Historical School—a characteristic which illustrates how congenial a soil it found in the world of the common law, and how potent and

[1] (1890) 25 Q.B.D. 57.

[2] We are inevitably reminded of the remark of Mr. Justice Holmes that 'it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV'.

serviceable an antidote it proved to be for the views of Benthamism—is to be found in its antipathy to statute law. Of this bias some curious illustrations are to be found in the attitude of certain American Courts towards statutes modelled on Lord Campbell's Act. Influenced by the consideration that the rights conferred thereby are foreign to the common law, some jurisdictions have held, for example, that a non-resident cannot recover; that the burden of proof that the killing was unlawful rests with the plaintiff; and that whereas the contributory fault of a claimant bars his recovery if he is *sole* plaintiff, it is without effect if innocent claimants join with him in the suit.

A variant of the Necessitarian philosophy, which has attained some importance in recent times, teaches that the secret of legal evolution is to be found in the economic conflict of rival social classes. In the words of Brooks Adams:

'Whether the social resultant expresses itself through a prophet like Moses, or an emperor like Caesar, or a moneyed oligarchy like the modern British parliament, the result is the same. The dominant class, whether it be priests, or usurers, or soldiers, or bankers, will shape the law to favour themselves, and that code will most nearly approach the ideal of justice of each particular age which favours most perfectly the dominant class.'

On which doctrine Pound comments that:

'A theory that leaves out of account the quest of jurists and of judges for an ideal of absolute, eternal justice, well or ill conceived, to which they seek to make the rules enforced in tribunals approximate as far as possible, and juristic tradition, that is, traditional principles and traditional modes of reasoning therefrom, ignores the chief influences in determining the bulk of the rules actually in force in any legal system at any given time. No doubt the ideal of justice is affected by training and associations which reflect class interest. On the other hand, the conscious endeavour to adhere to the ideal is a powerful check on the operation of class interest. The self-interest of the dominant class in the community for the time being affects chiefly the imperative element in legal systems, that is, legislation. Perhaps for that very reason legislation, as

a means of making law, has played the least part in legal development.'

Theories of class struggle are usually based upon short-lived penal legislation. An example of the perils of taking this somewhat narrow view of legal development is furnished by the interpretation which has been placed upon the fellow-servant rule. This rule, which, as you will remember, prevailed for a time in the common law, was to the effect that where one of two employees was injured by the negligence of the other, the employer was not to be held responsible, and it had been suggested that this doctrine showed the class-bias of the judges. It is forgotten, remarks Pound, that to see anything anomalous in this rule, you must regard it as axiomatic that a master should in general be responsible for his servant's torts—a reflection which seems to turn the tables. In a similar view, Professor Bohlen has suggested that the decision in *Rylands* v. *Fletcher*,[1] and its rejection in some American jurisdictions, are phenomena to be explained by the fact that English judges are, while American judges are not, generally associated with landowning rather than with the industrial classes. Pound replies that American judges have in general treated questions relating to property in land very much in the same way as the judges in England, and that in particular they give specific performance of contracts of sale of town lots, even when they are, to all intents, as fungible as sacks of coal.

The purely economic interpretation does not fit the facts, but we must do this doctrine the justice of recognizing the service it has rendered in leading us 'to think of the satisfaction of wants rather than of the assertion of wills'.

Such then, are the views, or typical samples of the views, which we are urged to reject. It cannot be conceded that lawyers and judges, as such, have no concern with legal progress; and still less may we agree that we are of necessity

[1] *Interpretations of Legal History*, p. 105.

the impotent spectators of the unrolling of the book of Fate. It is certainly not the case that laws have always been secreted by the ductless glands of the community; and if it may be conceded that there possibly are some compelling laws of human conduct, it is difficult, if not impossible, for any course of conduct to be both necessary and known; for the very fact of knowledge sets us free.

As lawyers then we are both free and responsible; free to mould the law, and responsible to the community for the energy and intelligence we bring to bear upon that task.

'Perhaps nothing', says Pound,[1] 'has done so much to create world-wide dissatisfaction with law and make problems of law-reform acute almost everywhere, as the persistence in juristic thinking and juridical decision of nineteenth-century ideas of the *futility of effort* at a time when the efficacy of effort had become part of the sociological and the political creed.'

'The science of law', he says elsewhere,[2] 'as we had understood it until quite recently, assumes legal precepts as already existent. It does not tell us how to direct our creative energies to the devising of new precepts or of new and improved machinery for making them effective.'

We must learn then to think as legislators. But what ideal is to be our guide? We cannot go back to the standpoint of the eighteenth century, and restore the canon of natural law. We no longer hold the historical superstitions upon which the philosophy of natural law largely rested; and if natural law is not a bad descriptive name for those current moral ideas which are accepted without question, it is of no assistance in deciding controversial questions; and we smile when we look back and see the way in which lawyers in the past closed what we can now see to be open questions in the name of natural reason, as when Langdell, for example, dismissed as contrary to reason the doctrine of *Lawrence* v. *Fox*, the celebrated New York case, which allowed a stranger to acquire a right of action under a contract for his benefit. The tradition of natural law still lingers in interpretations of the American

[1] *H. L. R.* xxv. 489 ff. [2] *Crim. Justice*, p. 35.

Constitution, and has made it relevant for Mr. Justice Brandeis in a recent dissenting judgement, in which the question at issue was whether a State legislature had power under the Constitution to regulate by a system of licences the trade in ice, to observe that a 'man has no natural right to be an ice-man'.

Pound points out that the philosophy of natural law exercised an explicit influence to a much later date in America than in England. This phenomenon he ascribes to the fact that for the two generations succeeding the Revolution the Courts were largely preoccupied with the question how much of English common and statute law was to be regarded as retaining force in the States. There was a certain political prejudice against English institutions; on the other hand, English law was the only positive law with which the judges and the people were familiar (more copies of the first edition of Blackstone had been sold in America than in England); and the conception of natural law, on which Blackstone lays eloquent emphasis, appeared to offer an authoritative criterion for distinguishing between what was to be retained and what rejected. Other causes were the pioneer spirit, and the influence of the Constitution, both of which were antagonistic to the devices of man as expressed in legislation, and directed the minds of the judges to principles of decision which could be believed to be of universal authority. The Constitution itself was regarded as being 'declaratory of principles of natural constitutional law which were to be deduced from the nature of free government', and not so very long ago the Supreme Court of one of the States laid down dogmatically that primogeniture in estates tail could not coexist with the axioms of the Constitution which guarantees to each State a republican form of government. But this appeal from the law of England to the law of Nature was not in fact very successful; and it is impossible to deny that American 'Naturrecht' bore a singular resemblance to the substance of the English decisions and authorities of the seventeenth, eighteenth, and the first

half of the nineteenth centuries. America hardly experienced the Benthamite influence; and when the belated reaction against natural law took place—a generation later than in England—and the historical philosophy claimed the vacant place, the resulting fervour was intense, and has only recently begun to wane.

A type of legal reasoning which is closely allied to that of the analytical school is criticized by Pound under the name, borrowed from Ihering, of the 'jurisprudence of conceptions'. Examples of unfortunate decisions resting upon this philosophy are furnished by cases where injury done by trespass but without negligence have been held to be actionable at the suit of a person entitled to be on the land, but not at the suit of a person there casually. 'It was', he says,[1] 'a welcome sign of the times' that when legal conceptions were pressed upon the New York Court of Appeals in the case of *Hynes* v. *N.Y. Central Railroad Company*,[2] in 1921, and it was asked to hold that where a spring-board projected from a railroad right of way over a river where the public had a right to bathe, as the spring-board was annexed to the right of way and hence was a fixture, a man on the end over the river was technically a trespasser, and so was not protected from the negligence of the railroad company—when asked to apply logic to legal conceptions in this way, the Court denounced the jurisprudence of conceptions and refused to carry out the conception of a fixture and the conception of a trespass to such a result.

But if it is impossible for us to find the key to the teleology of law in the Year Books, in the principles of formal logic, or in what we may imagine to be the moral code of man in a state of nature, is it possible to find a philosophy suited to the requirements of our time in any abstract analysis of the nature of political societies, and of the moral obligations of the citizen? This is a type of speculation which flourishes in Germany, and leads to

[1] *Interpretations of Legal History*, p. 123.
[2] (1921) 231 *N.Y.R.* 229.

what appear to the English and American lawyer to be some very strange doctrines—as when a recent writer teaches that the legal obligation to perform an accepted promise rests upon an *a priori synthetic judgement*, that is to say, a judgement of the same logical authority as that one and one are equal to two. That speculations of which this is an unfair example find a more congenial soil in Göttingen and Marburg than they do in Oxford or Boston is not due to the Germans being less sensible or less practical men than we; they suffer, it is true, from having only one word for *law* and for *right*; but we also have had our systems of metaphysics, by which our judges have been governed; and when Lord Bryce said that 'unless philosophical jurisprudence can help to teach us the *law that is*, it is of little value', his implication was mistaken, for *the law that is* is largely an illusory concept. The great services which German speculation on jurisprudence have rendered have lain in its emphasis upon the idea of the *purpose of law*, and upon the intimate connexion between law and morality, a connexion which, under the influence of the Historical and the Austinian Schools, we have been too apt to minimize, a weakness which Sir William Erle stigmatized when he described 'strong decisions' as 'decisions opposed to common sense and to common convenience'.

The fault, judged by our present needs, of the metaphysical school of jurisprudence is that, from the time of Kant onwards, its governing idea has been that the purpose of law is to secure the maximum of abstract individual self-assertion. It has attached supreme value to the satisfaction of the atomistic individual will; whereas, as even Dicey admitted thirty years ago, we have long since passed into the collectivist age, when the most convinced protagonists of the individual incline to rest their case on the interests of the community.

The German writer who finds most favour in Pound's eyes is that remarkable man Kohler, who as a judge, as author of text-books, as ethnologist, and as legal philosopher, came nearer than any one else in modern times, as

my author says, to taking all law for his province. Kohler's guiding idea is that since the needs and progress of society are always changing, it is no part of the business of the law to idealize and to maintain any static set of principles; its function is to promote not immobility but steady motion. It is, for example, a question of time and place whether it maintains and furthers civilization,[1] to leave men wholly free to contract as they choose, or whether the legal order should hold down their self-assertion in certain situations and for certain purposes. In order that the law may be equipped to discharge this function, it is necessary for the judge and the legislator to ascertain and to formulate the ideas of right and justice presupposed by the civilization of their own time and country, and to seek to shape the legal materials that have come down to them so that they will express or give effect to these postulates. There is no eternal law; but there is an eternal goal—the development of the powers of humanity to their highest point.

Pound's reason for thinking Kohler's otherwise very adequate philosophy open to criticism is that there runs through it a dangerous vein of Hegelianism—a recurrent implication that if society is always changing, and if law must always be readapted to its needs, yet the changes are governed by an ascertainable dialectic, the evolution of an idea. And the danger comes from this, that whenever the law thinks that it has a specific insight into the nature of things, it tends to be unduly conservative.

The banner under which Pound invites his readers to enlist bears the inscription 'Sociological Jurisprudence'. Translated into less repellant language, this means that it is the duty of lawyers to think as citizens of a changing world, to know what is going on, and to discharge their unescapable duty of law-making in the light of that knowledge. In Pound's own words:[2]

'It is possible to put the matter in wholly innocuous phrases and in terms of the modes of thought of the moment. . . . Let us put the new point of view in terms of *engineering*; let us

[1] *Interpretations of Legal History*, p. 147. [2] *S. P. L.*, p. 195.

speak of a change from a political or ethical idealistic interpretation to an engineering interpretation. Let us say that the change consists in thinking not of an abstract harmonizing of human wills but of a concrete securing or realizing of human interests.'

The whole history of civilized law reveals a perpetual oscillation between the introvert ideal of stability and static perfection, with primary emphasis on the abstract rule, and the extrovert ideal, which commands that the law be remoulded in conformity with the new interests and new moral standards of the outside world. This is the swing of the pendulum upon which, in this generation we are embarked.

'Those who conceive', says our author, in the *Spirit of the Common Law*,[1] 'that the land is entering upon . . . a new stage of development speak of that stage, in contrast with the nineteenth century, as a stage of socialization of law. For in contrast with the nineteenth century it appears to put the emphasis upon social interests; upon the demands or claims and desires involved in social life rather than upon the qualities of the abstract man *in vacuo* or upon the freedom of will of the isolated individual.'

In the book from which I have just quoted Pound gives eight examples, drawn from American law, of this socializing tendency. Briefly rehearsed, these are: *first*, the increasing readiness of the Courts to prevent antisocial exercise of the incidents of ownership, as, for example, in the case of so-called 'spite fences'; *second*, legislative limitations upon freedom of contract, such as we have long been familiar with in England, in the interests of conditions of labour; *third*, legislative limitations on the power of disposing of property, illustrated by laws forbidding a husband to assign his wages, alienate the family house, or mortgage household goods, without the concurrence of his wife; *fourth*, legislation restricting the rights of creditors, illustrated by Homestead laws; *fifth*, the revival of the idea of liability without fault, the idea which bears the English

[1] *S. C. L.*, p. 195.

label *Rylands* v. *Fletcher*; *sixth*, the marked judicial tendency to transfer the natural resources of the country from the category of *res communes* to that of *res publicae*, and to hold that running water and wild game, for example, are assets of society not susceptible of private appropriation; *seventh*, the increasing tendency to hold that public funds should respond for injuries to individuals by public agencies—or as we should say, to make the Crown liable in tort; and *eighth* and finally, the noticeable change from the old attitude of the law with regard to dependent members of a family, illustrated by the decreasing disposition to permit decisions with regard to children to be governed by consideration of the supposed natural rights of the parents.

I am in danger of exceeding my allotted time, and must bring these few remarks to a close. Those of my hearers who are acquainted with Dean Pound's writings will have appreciated the difficulty of my task in endeavouring to give any account, in one lecture, of the philosophy of this very learned, penetrating, and stimulating writer.

The main burden of Pound's exhortation may be summed up as follows:

What we think, and write, and teach about the law is a matter of practical importance, for the conceptions which gain ascendancy in the community as to the significance and the mission of the law mould and inspire the actions of the legislator and the judges. Upon the legal profession in each country there devolves then a responsibility, the due sense of which has for some long time past been in abeyance—Pound only purports to speak for America—the responsibility for thinking and advising the nation as a profession. This responsibility lies less immediately upon the Courts, since they must 'go with the main body, not with the advance guard';[1] but it lies upon all those who have a less immediate responsibility for the preservation of the specious appearance of immutability, to con the chart, to determine at frequent intervals our latitude and longitude,

[1] *S. C. L.*, p. 191.

and to lay the course for the next port. We want far more information, more statistics; for lawyers, like doctors, know too little of the subsequent fate of the lives and concerns in which for a moment they have intervened; and if I may finish with a controversial matter, it is to say that though his writings are primarily addressed to his own countrymen, no English reader who takes Pound's message at all to heart will fail to discern between the lines, on almost every page, the words 'wanted, a Department of Justice', in default of which indispensable organ of reason, there is some ground for the fear that a justly impatient community will one day send us all about our business.

KELSEN'S PURE SCIENCE OF LAW[1]

By H. LAUTERPACHT

I. *Normative Sciences and the 'Fundamental Rule'*

THE final estimate of Kelsen's place in legal philosophy and jurisprudence is likely to be—if this submission may be made at the *beginning* of the lecture—that his

[1] Hans Kelsen was born in 1881 at Prague. In 1911 he became lecturer (*Privatdozent*) at the University of Vienna. In 1919 he was appointed to the Chair of Public Law and Philosophy of Law in that University. Since 1930 he has been Professor of Public and International Law at the University of Cologne.

His principal works are:

Hauptprobleme der Staatsrechtslehre (entwickelt aus der Lehre vom Rechtssatz) (1st ed., 1911; 2nd, unaltered, ed., 1923, with a new Preface): cited here as *Hauptprobleme.*

Das Problem der Souveränität und die Theorie des Völkerrechts (1st ed., 1920; 2nd ed., 1928): cited here as *Souveränität.*

Der soziologische und juristische Staatsbegriff (1st ed., 1922; 2nd ed., 1928): cited here as *Staatsbegriff.*

Allgemeine Staatslehre (1925): cited here as *Staatslehre.*

The following of the more important monographs and articles may be mentioned:

Die Staatslehre des Dante Alighieri (1905).

Über Grenzen zwischen juristischer und soziologischer Methode (1911).

Die Verfassungsgesetze der Republik Deutschösterreich (1919, 1920).

Vom Wesen und Wert der Demokratie (1st ed., 1920; 2nd, revised, ed., 1929).

Österreichisches Staatsrecht (1923).

Sozialismus und Staat (1923).

Die Bundesexekution (1927).

Der Staat als Integration (1930).

Les rapports de système entre le droit interne et le droit international public, Hague Recueil des Cours, 1926 (iv), pp. 231–331.

'Über Staatsunrecht', in *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart,* xl (1913), pp. 1–114.

'Zur Lehre vom öffentlichen Rechtsgeschäft', in *Archiv des öffentlichen Rechts,* xxxi (1913), pp. 53–98, 190–249.

'Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft', in Schmoller's *Jahrbuch,* xl (1916), pp. 1181–1239.

'Zur Theorie der juristischen Fiktionen', in *Annalen der Philosophie,* i (1919), pp. 630–58.

'Sozialismus und Staat', in *Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung,* ix (1920), pp. 1–129.

[*cont. overleaf.*

work constitutes a powerful contribution to legal thought. But so destructive has been his assault upon most of the accepted doctrines that what leaps to the eye is not the imposing edifice of an original legal system for which he has become responsible, but the negative irreverence of the iconoclast. There is hardly a leading doctrine or conception of modern jurisprudence that he has not assailed. It is sufficient to mention the sovereignty of the individual State, the juxtaposition of State and law, the distinction between private and public law, the distinction between juristic and physical persons, the conception of subjective rights, and the current assumption of a rigid distinction between the legislative and the judicial processes. This *prima facie* impression of a purely negative effort is accentuated by Kelsen's insistence on the formal character of his analysis of the positive law and the absence of any political or ethical tendency in the 'pure science of law'. It is a pure science of law and State, i.e. a science whose sole object is to comprehend State and law in their juridical reality, to grasp them notionally, to analyse their structure, to explain their interrelations. It refrains painfully from making science an ideology of politics or an instrument in the struggle for power. Nothing is more abhorrent to it than the attempt to cloak partisan interests in the garb of legal science. Kelsen insists repeatedly that only a purely analytical approach to law can be regarded as scientific. He is impatient of the cry that jurisprudence

'Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik', in *Zeitschrift für öffentliches Recht*, ii (1921), pp. 453–510.

'Gott und Staat', in *Logos*, ii (1922–3), pp. 261–84.

'Marx oder Lassalle', in *Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung*, xi (1924), pp. 261–98.

Das Problem des Parlamentarismus (1925).

Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus. Publications of the Kant Society (1928).

'Allgemeine Rechtslehre im Lichte materialistischer Geschichtsauffassung', in *Archiv für Sozialwissenschaft und Sozialpolitik*, lxvi (1931), pp. 449–521.

And see, for an exhaustive bibliography of Kelsen's writings, Métall in *Gesellschaft, Staat und Recht. Festschrift gewidmet Hans Kelsen* (1931), pp. 417–41.

must serve the needs of life. The needs of life, he says, can also be served by helping to comprehend objectively the nature of things, including the nature of the State and of the law.[1] Throughout his work he adheres to the formal and analytical method with a consistency which, he claims, surpasses that of the great philosopher whom he professes to follow.

For his method and approach to law are essentially those marked out by Kant. After Professor Ginsberg's most lucid exposition of this method as followed by Stammler[2] it is not necessary for me to repeat in what it consists. However, while Stammler went beyond Kant in developing what has been called the supplemental categories, Kelsen does not follow Kant all the way. He does not follow him for the reason that, in his opinion, Kant, a personality deeply rooted in Christianity, abandoned in his capacity as legal philosopher the transcendental method of his critical idealism to the point of making his *Metaphysic of Morals* a perfect expression of the classical natural law doctrine.[3] But he fully accepts and transplants to the domain of law the basis of Kant's method, namely, the view that knowledge is not merely a passive picture of the objective world, but that it creates its objects according to its inherent law from the material given by the senses. Kelsen's conception of law is such a creation. Contrary to Stammler, he does not regard the law conceived as the sum total of legal rules as a will. Neither does he regard it as a command or a psychological process or even a social reality. It is the product of a mental operation. It is a phenomenon in the category of essence (*das Sollen*) as distinguished from the category of existence (*das Sein*);

[1] See his article entitled 'Juristischer Formalismus und reine Rechtslehre' (1929), p. 18. And see ibid., pp. 16, 17, where he points out that at least that aspect of his theory which is based on the doctrine of the gradual crystallization of the law (see below, p. 114) is of pre-eminently practical importance inasmuch as it amounts to the incorporation of the principles of the 'free law' school on the subject of judicial activity.

[2] See above pp. 38–51.

[3] See *Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), pp. 75–7.

which is an abstract way of saying that the science of law is a branch of normative sciences as distinguished from natural sciences; which is still another abstract way of saying that the legal rule is concerned with what the positive law says shall be, and not with the question why positive law is obeyed or what the positive law ought to be. The legal rule itself is logically an hypothetical judgement. It says: If a person becomes responsible for a certain state of facts through commission or omission, compulsion shall be applied against him. There are in the legal rule two sets of facts: the legal cause and the legal effect. But the connexion between them is not one of cause and effect in natural science. It is a normative connexion. The law does not say that if *X* (commission or omission) happens *Y* (compulsion) will happen. It says that if *X* happens *Y* ***shall*** happen. The relation is determined not by the category of causation, but by the equally fundamental category of norms. The connexion between the two sets of facts is not one of causation but of attribution. We attribute the legal effect to the legal cause. The attribution is effected through the instrumentality of the legal rule.

The insistence on the character of legal science as a normative science distinguished from natural science is an essential feature of Kelsen's pure science of law. It is, therefore, of importance to realize clearly the difference between these two branches of knowledge.[1] Any concrete law in the domain of natural science is a specific application of the general law of causality. It shows a certain event as the necessary consequence of another. It explains to the human mind the actual occurrences in nature. In normative sciences the word law is used in an entirely different sense. It lays down rules which prescribe right conduct. The rules of logic, grammar, ethics, aesthetics, and law are normative rules. They do not predicate what actually happens; their existence is not impaired by the

[1] The distinction between natural and normative sciences is put very clearly in what may now be regarded as a classical chapter in *Hauptprobleme*, pp. 3–33. See also *Staatsbegriff*, pp. 75–81.

fact that they are disregarded in individual cases. The rules of English grammar will survive anything that may be said in this lecture. But the law of gravitation would not survive if it were demonstrated beyond possible doubt that on a single occasion an object failed to behave in accordance with that law.

From the fact that what is and what shall be—the category of causation and the category of norms—are two distinct modes of thinking, it follows directly that one cannot be derived from the other. A norm cannot be explained by reference to a fact in the domain of existence. The question why a legal rule is obeyed, is a question in the domain of individual or social psychology and is as such outside the domain of legal science. The question why a legal rule is binding is properly a question to be answered by the lawyer. But it can only be answered by reference to another—higher—legal rule. The answer to the question why a ruling of an administrative authority shall be obeyed is that there is a higher legal rule, for instance, that embodied in an Act of Parliament, which lays down that the law as prescribed by the administrative authority shall be obeyed. Why must the law as laid down by Parliament be followed? The answer is that there is a fundamental rule of the Constitution to the effect that the law of Parliament shall be obeyed. The validity of a legal rule can thus logically never be understood by reference to a fact in the domain of existence but only by reference to what shall be, i.e. by reference to a fact of a higher order in the domain of norms. This relation of delegation is one of the principal features of Kelsen's system. Of course, ultimately the question arises why shall the Constitution be obeyed. The answer is: because we have adopted, as an initial hypothesis of the legal system, the fundamental norm (*die Grundnorm*) that the Constitution shall be obeyed. The reasons which prompt us to accept the validity of the fundamental rule are in themselves meta-legal. The jurist goes back to the fundamental rule; he does not go beyond it. It is an assumed, hypothetical validity.

Undoubtedly, the choice of the initial hypothesis is not an arbitrary matter. We must be careful in choosing it seeing that it has to be the basis of a structure enclosing a complicated variety of norms. We have to choose it so as to be able to include, by reference to it, as much as possible of the actual experience[1] of positive law as habitually obeyed in a given society. There would be no use in choosing as the initial hypothesis a rule to which nothing or little corresponds in actual experience.[1] The axioms of mathematics on which the theorem of Pythagoras is based exist independently of whether they are recognized by more or less individuals, but an initial hypothesis which would make it impossible to explain and to include within a uniform system the actual operation of legal rules within the State would be of little value.[2] It would, for instance, be absurd to try to comprehend the present Russian State with the help of the initial hypothesis which could be assumed before the Revolution of 1917, namely, that the will of the Tsar shall be obeyed. There must be a certain

[1] See *Souveränität*, pp. 85–101.

[2] For a lucid presentation of the purpose and the limitations of the 'fundamental norm' see *Staatsbegriff*, pp. 95 ff., and *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), pp. 12–14, 66–72. For a criticism of it see Verdross in *Juristische Blätter*, 25 October 1930; Walz in *Archiv des öffentlichen Rechts*, New Series, xix (1930), pp. 1 ff.; Ross, *Theorie der Rechtsquellen* (1929). The initial hypothesis is not, of course, a speculation confined to continental writers. The attention of the English student may perhaps be drawn to Salmond's formulation of the idea of the fundamental norm. He says: 'It is requisite that the law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived. In other words there must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. . . . Whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. No Statute lays it down. It is certainly recognized by many precedents, but no precedent can confer authority upon precedent. It must first possess authority before it can confer it. If we inquire as to the number of these ultimate principles, the answer is that a legal system is free to recognize any number of them, but it is not bound to recognize more than one. From any one ultimate legal source it is possible for the law to be derived, but one such there must be.' *Jurisprudence*, § 48 ('Ultimate Legal Principles').

parallelism between what is and what shall be. The tension between the factual and the normative must not be too great (if the fundamental rule is to retain its usefulness), just as it ought not to be too small (if law is to remain a normative as distinguished from the explicative sciences). It will be noted how dangerously near the realm of norms approaches the realm of mere fact—a danger which has led many to base law on might or to identify the two. Kelsen attaches the greatest importance to keeping them apart. The initial hypothesis is certainly influenced by facts, including the paramount element of might. It can even be said that it transforms might into law. However, once adopted it constitutes the beginning of an autonomous system governed by its own specific—not by causal—laws. That these laws are autonomous and altogether specific may be seen from the fact that the revolution constitutes an absolute break in the legal order and that the new legal order can never be comprehended by reference to the old one but only by dint of the adoption of a new fundamental hypothesis. The very fact that there is such a thing as a revolution in the legal order shows that its laws are different from causal laws. There are no revolutions in the natural order governed by natural laws. There is only evolution, i.e. relations of cause and effect.

Enough has been said to indicate that the 'fundamental norm' is not only the juridical basis of the legal system as construed by Kelsen. It is indicative of Kelsen's approach and legal philosophy in general. The norm which lies at the basis of his system, although not arbitrary, is purely relativist and hypothetical. There is in it no such absolute element which it would necessarily contain if it were grounded in a material ethical value, for instance, in that of justice. The initial hypothesis is an act of human intelligence. It is not a dictate of a higher power. It is not a deduction from an immutable principle of justice; it is an assumed hypothesis glorying in its realistic relativism. Kelsen claims for his initial hypothesis that it transforms might into law. However, this claim is in itself morally

indifferent. Frequently such transformation will prove ethically repugnant. The fundamental norm is a methodological instrument pure and simple. It certainly substantiates Kant's dictum of 'the method creating its objects'.

II. *Some Practical Aspects of the Pure Science of Law*

Subjective Rights and Legal Personality. It would be a mistake to assume that this formal basis of Kelsen's science of law divorces it altogether from legal problems of practical importance. In order to dispel a misleading assumption of this kind it may be necessary to show—before proceeding with the exposition of Kelsen's doctrine of the identity of State and law—that there is a direct relation between his analytical method and some pre-eminently practical problems of law. This may be seen, for instance, from his treatment of the question of rights, especially of subjective rights. In Kelsen's view the legal duty is the central and only essential element of the legal system. For it is of the essence of an ordering, in particular of a compulsory ordering, that it binds those subjected to it. This fact of being bound is best expressed through the conception of duty. The legal duty is nothing else than the legal norm related to the concrete conduct of the given individual. A legal norm lays down that a person is bound to obey a given rule of conduct only in so far as the norm posits the contrary conduct as a condition for an act of compulsion conceived as the consequence of the wrong. Every legal rule necessarily lays down a legal duty. It may contain a legal right if the putting into effect of the consequence of the disregard of the legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied. The subjective right does not confront the objective law as something independent, for there is a subjective right only in so far as it is laid down in objective law. The subjective right is one of the possible and by no means necessary tools of legal technique. It is the specific technique of a society which is built upon the basis of private property and therefore

pays particular attention to individual interests.[1] But even in that society modern criminal law has overcome that technique inasmuch as in the place of the injured person (who in the primitive stage of legal development was the subject of the right to claim the realization of the legal sanction) the State itself puts in motion the procedure which realizes the consequences of the legal wrong. The understanding of the central position occupied by the legal duty helps us to overcome the dualism between subjective right and objective law. We see clearly that the subjective right is not different from the objective law. It *is* the objective law.

The result thus reached has in turn certain practical consequences. Once we have rejected the conception of subjective right as an independent element in law we have little difficulty in recognizing that the conception of a subject of law or of the person—conceived as an entity independently confronting the law—is only an artificial device which juristic thinking has adopted in order better to comprehend certain objects of legal knowledge. A 'person' is merely an expression for the personified unity of a bundle of legal duties and rights. Moreover, from this denial of the reality of the subject of the law there follows the rejection both of the reality of the juristic person[2] and of any material distinction between the latter and the physical person. Juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum total of legal rules applicable to one person. The juristic person is the personification of the sum total of legal rules applicable to a plurality of persons. The rights and duties of juristic persons—including the

[1] See 'Allgemeine Rechtslehre im Lichte materialistischer Geschichtsauffassung', in *Archiv für Sozialwissenschaft und Sozialpolitik*, lxvi (1931), pp. 491 et seq.

[2] It is easy to guess that Kelsen also rejects the reality of groups not only as juristic persons but as psychological entities on the ground that psychology in its sphere has been guilty of the same hypostatizing process as legal science in regard to the juristic person. How important this aspect of his teaching is especially for international law will be seen from what will be said later on the theory of the identity of State and law.

juristic person of the State—are thus conceived as the rights and duties of human beings and of nothing else.[1]

The Doctrine of the Gradual Concretization of the Law. As Kelsen's attitude in the matter of subjective rights and legal persons follows largely from the conception of the legal system as the sum total of norms ordering compulsion, so the other basic principle of the pure science of law, namely, the phenomenon of delegation from the fundamental hypothesis, results in a specific attitude in the matter of the relation between the creation and the application of the law. Kelsen denies that there exists a difference of kind between the two processes. He accepts and develops the doctrine, introduced by other German and Austrian writers, of the 'gradual concretization of the law' (*die Lehre vom Stufenbau des Rechts*). There is, according to that doctrine, a descending process of delegation from the Constitution to legislation, administration, judicial decisions, and private transactions. Legislation is only relatively law-creative; it applies the fundamental rule of law embodied in the Constitution, just as administration applies the law laid down in statutes. The process of the creation of the law is not concluded in legislation. It is continued in administration, in judicial decisions laying down the concrete rule, in private transactions—grounded in and validated by the higher rule of law—laying down the rules by which the parties will be bound in the future. If the doctrine of the gradual concretization of the law is accepted then there follow from it two practical consequences. One is that it is no longer possible to maintain that the subjective private law sphere of the contractual creation of law is, in contradistinction to legislation, politically indifferent. If we regard the private contract as the crystallization of the more general rule of law which establishes the institution of private contract, which defines it and renders it binding, then, of course, the contract establishing the subjective and private right is no less the instrument of political domination than the

[1] See *Staatslehre*, pp. 47–71.

objective and impersonal law laid down by statute or administrative decrees. Kelsen quotes with approval a distinguished socialist commentator[1] to the effect that the right of the capitalist, grounded in contract, is nothing else than public power blindly delegated to the advantage of the class in power. From this point of view freedom of contract in a number of relationships becomes a fiction.

The other—more general and less controversial—consequence of the doctrine of the gradual concretization of the legal order is that it facilitates the acceptance of the principles of the 'free law school' in the matter of judicial activity. As the statute is recognized as the mere frame to be filled by the activity of judges or administrators continuing in a more concrete sphere the function of the legislator, it follows that within the orbit of the statute there exist a multitude of possible decisions to be arrived at by the exercise of judicial discretion within the four corners of the law.

The Distinction between Private and Public Law. Once we realize that the difference between the creation and the application of the law is less pervading than is commonly supposed, then the way is open to a new approach to the question of the distinction between private and public law. Kelsen rejects this distinction. He regards it as liable to abuse, in a manner contrary to positive law, in the interest of persons and groups in authority and as one which has actually been so abused. He denies the accuracy of that test of the distinction which is based on the alleged difference of interests protected by private and public law respectively. The very fact that the legal order protects a private interest shows that it is a matter of public interest to protect that private interest. The fact that the law contains private law rules concerning the sale of goods shows that there is a collective interest in the regulation of

[1] Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*, p. 55. And see Kelsen, 'Allgemeine Rechtslehre im Lichte materialistischer Geschichtsauffassung' (quoted above), p. 495.

this particular transaction. Any rule of criminal or administrative law—commonly included within public law—can ultimately be traced to the individual person or persons in whose interest it has been created.[1]

Neither is there, according to Kelsen, any foundation for the traditional distinction as based on the theory that while private law governs the relations between equal and co-ordinate persons, public law governs the relations between the State authority and the subjects subordinated to it. That theory attributes to certain persons, notably the person of the State, a legal value higher than that attributed to other persons. However, this legal *Mehrwert* disappears when we consider analytically in what that alleged higher value consists. It is supposed to consist in the fact that certain persons are legally bound to obey the commands of other persons endowed with attributes of rulership, i.e. that in case of disobedience the person issuing the command may apply force against the recalcitrant. The position is said to be different in the relation of private persons. The duty to observe certain conduct is here grounded not in the unilateral will of one person, but in agreement; moreover, in case of a breach of the legal duty thus created, compulsion issues not from the

[1] In this, as in many other respects, the approach and the results of Kelsen's analytical method show a striking resemblance to those of Austin: 'Any injury cognizable by the law of England will be found to be an injury to some person or body of persons. Public nuisances for instance; offences against *bonos mores*, &c. which seem to be violations of obligations to which there are no corresponding rights in any given person or persons; and which may be called public offences, by reason of the injury being entirely contingent, and being liable to fall upon *any* of the whole heterogeneous mass which is called the Public. In all other cases of intentional or negligent violation, there is the same contingent evil, but there is also a past injury done to some assignable individual, either in his own right or as trustee for others.'—Austin, *Jurisprudence*, vol. ii (4th ed. by Campbell), pp. 786, 787 (marginal note by Blackstone, vol. iii, chap. 13). See also ibid., pp. 783, 784: 'By "the Public" (where it means anything) we mean all the individuals who compose the community, governors as well as governed. In which sense of the word public, *all Law is public*; whether we look to the *persons* in whom rights and obligations reside, or whether we look to what is, or at least ought to be, the *end* of law: that end being the good of all.'

other party, but from the State. The difference seems to be substantial. It disappears when we consider that in law the duty to obey the command of a 'person in authority' is ultimately not grounded in the will of that person just as legal duties of a private nature are not ultimately grounded in the private agreement. The command of the person in authority is not a source of law: it is a condition which the law posits for the creation of duties of other persons just as the private agreement is a condition for the validation of a more general rule of law relating to the observance of contracts. In the one case the law says to the individual: Act in a manner prescribed by a certain individual acting in his capacity as the official of the State. In the other case it says: Act in a manner agreed upon in the contract. In both cases the expression of will—as commanded or as agreed upon—constitutes a concretization of the general rule of law. It cannot even be said that there is a substantial difference between the two relationships inasmuch as in the one case the State is the agency which issues the command and which applies the sanction in cases of disobedience, while in the other case the rule is enforced by a person other than the one who is entitled to insist on the fulfilment of the legal duty. For as a rule even in so-called public law the organ which fulfils the condition creating the legal duty and the organ which enforces it are not the same. However, it is impossible to discuss here the various theories of public law.[1] It is sufficient to say that, in addition to its theoretical interest, the problem is—like other aspects of Kelsen's teaching—of a pre-eminently practical importance. Kelsen attacks the orthodox distinction for the reason, *inter alia*, that it has always tended to confer upon State organs, particularly in their higher ranks representing definite partisan interests, a standing higher than that to which they are entitled by positive law. The same distinction, whose origin can be traced to

[1] This aspect of Kelsen's teaching is put clearly and concisely in *Staatslehre*, pp. 80–91, where the various theories of public law are discussed.

the autocratic legal principle of ancient Rome: *princeps legibus solutus*, supplies the theoretical basis for the immunity of the State organs from the normal operation of the law. It is the foundation of Machiavelli's *ragione di stato* which was essentially a number of postulates coined by the ruling autocracy against the traditional rule of law. It is the justification of the theory which liberates the 'State'—i.e., those who rule it—not only from the bonds of positive law but also of morality. In a different sphere it is responsible for the widespread assumption that it is inadmissible to treat problems of public law by analogy with private law—a view which has had particularly disastrous effects in international law by depriving it, in actual defiance of the practice of States, of a fruitful source of development.[1]

III. *The Identity of State and Law*

The most conspicuous and one of the most original aspects of Kelsen's teaching is probably the doctrine of the identity of State and law. The negative proof of this identity Kelsen shows to lie in the fact that other sciences cannot dispense with the legal conception of State and take it for granted. This can be said particularly of sociology. The State unity which sociology assumes as existing is a unity posited by legal science. The fact that an individual forms part of the State is one which sociology accepts not as the result of an investigation governed by causal laws, but by assuming the existence of a given legal ordering. Sociology does not inquire by means of an empirical investigation of psychological actions and reactions in society whether a person forms part of the State. Empirical sociology has never maintained that certain individuals belong to a certain State juridically but not sociologically, or sociologically but not juridically. Sociology assumes that all individuals—including children, lunatics, and,

[1] See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), §§ 30–4.

generally, persons who have no consciousness of their association with others in the State—comprised within the juridical unity of the State, participate in the psychological process which is the basis of the inward association of a unity in the sociological sense. But the assumption of such a psychological unity within the legally defined territorial borders of a State is no more than a fiction.[1]

However, it is not necessary to rely on a mere negative proof to demonstrate the identity of State and law. The direct proof of this proposition consists in demonstrating that the State is a normative ordering coextensive with the normative ordering of the legal system. Only by contemplating the State as a system of norms is it possible to understand the current conception of the State as an authority which renders the relation between the individual and the State one of subordination. It is impossible to understand the nature of the State without realizing that duties issue from the State, that persons who form part of the State are bound to observe certain rules of conduct. By the same token, the State can be thought of as an authority only inasmuch as it is an ordering consisting of norms binding the individual. It is true that we speak of the authority of nature and of the subjection of things to natural laws. This form of speech, however, is only an inaccurate analogy which is due to the fact that natural science has taken over the terminology of human thought in the matter of the relation of man to God and State.

This affirmation of the normative character of the State is substantiated by a more empirical approach. Within a territorially defined unit called State there presents itself to the eye an infinite variety of human actions. What is the criterion which leads us to qualify certain of these actions as actions attributable to the State? For the individual participates in the existence of the State only with a fraction of his personality. Not everything that he does is attributable to the State. What is the test which bids us

[1] See *Staatsbegriff*, pp. 4–74, for a discussion of the various sociological theories of the State.

to attribute certain actions not to the person responsible for them but to an ideal subject, the State? For purely empirical consideration there exist only acts of individuals; empirically there are no State acts. One arrives at the idea of the State only by means of a mental operation which attributes certain acts to the ideal entity of the State. The State as the subject of State acts is the central point of attribution. But the only possible criterion which permits the imputation of certain acts to the State is that these actions are in a specific fashion in accordance with a valid ordering, that they are posited in the norms of this ordering, and are reducible to a unity of this ordering. The State is nothing else than the personified expression of this unity. It exists owing to the mental operation of the assumption of a valid ordering to which we attribute certain human actions out of a multitude of others. Just as the conception of law, so also the conception of the State is made possible by the concept of attribution. In both the latter constitutes the central element. The identity of State and law is finally established when we consider that the State is not the only normative ordering. For so are many other social groupings. The State differs from them by being an ordering of compulsion. Its norms posit compulsion to be applied under certain conditions by one individual against another. If a person behaves in a certain way, that is, if he becomes responsible for an act of omission or commission, another person—the organ of the State—shall apply compulsion in the form of punishment or execution. The definition of the State as the personified unity of norms ordering compulsion proves to be identical with that of the law. The apparatus of compulsion, called State, is identical with the legal order. The norms, of which the State ordering is composed, are legal norms. The legal norm is the rule through which there takes place attribution of acts to the State. It consists of two elements: of the condition posited by the law (i.e. the conditioning fact) and of the legal consequence (i.e. the conditioned fact). The legal consequence in the form of compulsion is

the specific reaction of the law; it is at the same time the specific action of the State.[1]

The view that the State is a normative ordering is frequently confronted with the assertion that the State is a power, a force, a tangible being. One points to the typical manifestations of State power: its guns, ships, fortresses, prisons, and gallows. But these—the pure science of law retorts—are inanimate and indifferent objects. They derive their significance from the fact that they are used by men for certain purposes. And they are so used as the result of ideas dominating men, the idea, that is to say, that they ought to act in accordance with the law and that these acts are valid as State acts only in so far as they conform to the law. When one speaks of the power of the State one necessarily refers therefore to the actuating force of ideas whose content is the objective ordering of the State.

This being so, what is, according to Kelsen, the explanation of the predominant view of the dualism of State and law? The answer is that the State is the product of a process very frequent in the history of human thought, namely, of the process of personification.[2] Human thinking finds it inconvenient to deal unaided with the unity of the legal system and to visualize the complicated mechanism of a multitude of abstract norms. As a measure of convenience the totality of legal rules is represented through the more expressive metaphor of a human being whose

[1] The *normative* (as distinguished from the factual) *validity* of the State constitutes, as mentioned, its specific existence. However, it is important to remember that the State ordering is not only normatively valid, it is also actually operative. It not only shall be obeyed; it *is* more or less obeyed. But—and this is equally important for the understanding of the pure science of law—that does not mean that the *norm* is operative. It is the fact that the individual conceives the norm as valid—it is this fact which induces him to obey the norm. The person feels tempted to steal. He is reminded of the norm: 'thou shalt not steal', and refrains from theft. The norm itself is not a psychological phenomenon. It is a logical category *sui generis*. The *perception* of the norm —not the norm itself—is a psychological act. And it is the perception which is operative.

[2] *Staatsbegriff*, pp. 206 ff.

essential quality is a 'will'. This urge to personification, which is identical with the tendency to comprehend objects by analogy with the human ego, is deeply rooted in man's mind. At the same time, however, there is a tendency to hypostatize these instruments of thinking and to transform them into real entities. The instrument of perception is changed into an object of perception. The objects are thus duplicated. The 'State', created for the purpose of comprehending and better expressing the unity of the law, becomes an independent being standing in a variety of relations to the law and even regarded as the transcendent creator of the law. This process of duplicating objects of knowledge is a general phenomenon in science—to mention only the conception of force in physics, of the soul in psychology, and of substance in natural science. But as modern physics tends to eliminate from its system the conception of force and substance as different from qualities and relations of things, and as modern psychology tends to ignore the soul as distinct from individual psychical acts, so also, according to Kelsen, legal theory must abandon the conception of the State as an entity different from the legal order.

Already in 1913, Kelsen gave clear utterance to the view that the State is only the expression for the logical completeness and the inner consistency of the system of legal norms.[1] He pointed out that this personification is the result of a mental process similar to that which has led to the conception of a world deity as the personification of the unity of norms governing the universe in so far as they can be thought of in terms of a purposeful and self-consistent system. The implications of this phenomenon Kelsen subsequently developed in a magnificent analogy between the theologist's conception of God and the jurist's conception of the State. He shows how theology, as the result of its insistence upon the transcendence of God in relation to Nature, has become entangled in the same difficulties

[1] 'Über Staatsunrecht', in Grünhut's *Zeitschrift für das private und öffentliche Recht der Gegenwart*, vol. xl (1913), pp. 1–114.

which beset the juridical theory of the State in regard to the asserted meta-legal character of the State. Knowledge aims at unity, and the avenues by which the deeply rooted urge towards unity of knowledge achieves its objects are strangely uniform. This may be seen from the way in which both theology and the juridical theory of the State try to overcome the dualism in their respective domains. Christian theology has developed the doctrine of God limiting his infinite power by subjecting himself, in the person of the god-son, to the order, both moral and natural, of the world. God's freedom in relation to the physical world expresses itself in the conception of the miracle. The orthodox juridical theory of the State, says Kelsen, has a miracle of its own in the shape of the theory of the self-limitation of the State—of that entity which is supposed to be different from the law and at the same time inconceivable without the law. The State, it is said, establishes the legal order and after having established it subjects itself to the law. The same questions with which pantheistic thinkers overwhelmed orthodox theology are put by critical legal theory to the doctrine of the self-limitation of the State. How can God, omnipotent, in His essence indefinable and unbound, be at the same time subject as man to the laws of the world, be born, live, suffer, die, be subject to moral law? How can the State, whose essence is power as distinguished from law, be legally bound by its own law? If the State can *ex hypothesi* do everything it has the power to do, how can it be maintained that it can do only what it is legally entitled to do? There is no answer, says Kelsen,[1] to these questions. The problems created by the process of personification cannot be solved; they can only be dissolved by the abandonment of the personification.

The doctrine of the identity of State and law is not merely of theoretical importance inasmuch as it does away

[1] The analogy between God and Nature, on the one side, and Law and State, on the other, has been developed by Kelsen in *Staatsbegriff*, pp. 219–47, and in *Logos*, ii (1922–3), pp. 261–84.

with confusing problems of the relation of State and law, for instance, whether the State preceded the law or vice versa, or whether the State is subject to law or conversely. It is of practical value for a variety of reasons. The dualism of State and law lends itself easily to political abuse. It has degenerated into a dualism of two divergent systems of norms, of which one, under the designation of 'State', 'reason of State', 'State interest', or 'public interest', is frequently put forward as claiming priority wherever positive law leads to consequences which are unpalatable to those who happen to be in control of the State. Much of the distinction between public and private law is reducible to this source. It is undesirable to perpetuate the conception of a tangible State distinct from the law so that it can be said—as it has in fact been said—that the law is for the State (so that it may break it whenever convenient) and not the State for the law. It is undesirable to perpetuate the conception of a tangible State which even if it acknowledges the binding force of the rule of law divorces that law from the qualities and the moral substance inherent in the general principles of law governing relations between individuals. The elimination of the real entity of the State as distinguished from the law helps to effect the attribution of legal and moral responsibility to human beings who alone are subjects of legal rights and duties. These results lie already more in the international than in the municipal sphere. So also does the last consequence of the doctrine of the identity of State and law. If the State is only an expression for the unity of the legal system and if international law is recognized—as admittedly it is—as a body of rules of law binding upon States independently of their will, then, from a purely legal point of view, there is already in existence a State over and above the national sovereignties. The term 'super-State' is usually an easy prey for arguments, of controversial relevance, on the merits of nationalism and internationalism, and on the practical difficulties of international government. A truly legal treatment of

the conception of the *civitas maxima* will be greatly facilitated by the realization of the essential identity of law and State.

IV. *International Law*

The possibility of a legal construction of an already existent *civitas maxima* is only one of the incidental consequences, in the international sphere, of the doctrine of the identity of State and law. The bearing and influence of the pure science of law on international law is of a more direct and general nature. In no other branch of law is legal theory more self-contradictory and less mindful of the necessity of the unity of the legal system than in international law. It is in this domain that Kelsen's criticism has been most vigorous and destructive. But it is also here that his contribution has been of a truly creative nature and of generally admitted effectiveness. It is sufficient to refer to his analysis of the problem of the relation between international law and municipal law, to his criticism of the doctrine that the will of States is the only source of international law, to the application of the theory of the fundamental norm, in the form of the rule *pacta sunt servanda*, to international law, and to his criticism of the conception of sovereignty as an essential and specific attribute of the territorial State. It cannot be the object of this lecture to give a detailed account of Kelsen's discussion of these questions,[1] but his treatment of the problem of sovereignty—the *fons et origo mali*—requires consideration. It is not that Kelsen rejects the conception of sovereignty altogether. For sovereignty is the expression of the unity and exclusiveness of the legal system. The assumption of such a unity is essential for law as a science and as a normative reality. It is, in a sense, identical with the positive character of the law as underived from a source higher than itself. But this sovereignty need not and must not be the sovereignty of

[1] See *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

a single State. For the sovereignty of the State, while implying that the legal order of the State is independent, self-existent and self-sufficing, necessarily asserts the exclusiveness of that individual sovereign entity. It implies that in relation to it other similar sovereign systems exist only in so far as they have been recognized. Such recognition necessarily means nothing else than that the foreign legal system has been included within the legal order of the recognizing State. It is also clear that the sovereignty of the individual State excludes the possibility of a legal order above national sovereignties. But the more immediate and insoluble difficulty is that the sovereignty of one State, conceived—as in juridical logic it must be—as the highest power, is inconsistent with the sovereignty of any other State. These are startling but inescapable consequences of juridical analysis, and writers anxious to stress the binding force of international law but reluctant to abandon the accepted conception of sovereignty have taken refuge in transforming it from a merely formal quality of highest underived power to an aggregate of attributes called fundamental rights. This conception, which has all the drawbacks of the conception of subjective rights and which in fact presupposes the existence of an objective international law, is frequently the expression of the subjective wishes and pretensions of a given writer or State. It is an instructive example of the anarchy of legal science which cloaks political postulates and desires in the garb of subjective rights.

These are the consequences of the doctrine of the sovereignty of the State which—in the international sphere—is identical with the assumption of the primacy of municipal law over international law. The alternative assumption is that of the primacy of international law. According to this view the legal system of the individual State is a partial legal system derived by way of delegation from the legal order of the *civitas maxima* which in turn is based on the fundamental rule *pacta sunt servanda*. This world legal order is already in being as the result of the

existence of international law, and its existence is not affected by the absence of law-creating and law-enforcing agencies such as are found in a developed society. If such agencies were established they would not add essentially to what already exists. States would not be subordinated to a tangible super-State or to its political organs; they would continue to be subordinated to the same rule of law to which they are in principle subordinated to-day. There are other consequences of this approach. If the law of the State is regarded as delegated from a higher legal authority and not as the highest sovereign power, then there disappears at one stroke the asserted difference of kind between the State and the territorial and other associations within its borders. The difference becomes one of degree. It will be seen at once that this result has a bearing not only on the position of the State in international society. It is of equal importance for the question of the relation of the State to national associations. The rights of associations have—particularly in this country by writers like Maitland, Figgis, and Laski—been vindicated by dint of the emphasis on the real personality of groups. However, the doctrine of the real personality of associations is not only highly controversial: it is impossible to assert the real personality of associations without claiming the same in regard to the comprehensive association of the State itself—a doctrine upon whose unsatisfactory consequences in the international order it is not necessary to expatiate. The theory of the primacy of international law subordinates the State to a higher authority and thus achieves at the same time the result of depriving it of the element of absolute superiority over other corporate entities within its territorial limits.

Kelsen admits that the assumption of the primacy of international law is, from the point of view of a single State, not the only possible juridical hypothesis. In juridical logic it is possible to conceive of a system of law in which the national State appears as sovereign and other States and international law as delegated subordinated

systems of law included through recognition within the law of the particular sovereign State. But then, of course, from the point of view of that State the other States would not be sovereign. They would be recognized; which means that they would be delegated; which means that they would be subordinate. Thus while the primacy of the State law is possible as a juridical construction of the positive law of a single State, it is incompatible with the ultimate unity of legal knowledge. That unity abhors the conception of over sixty sovereignties of which each is at the same time the highest in its capacity as the recognizing and delegating authority, and of which each forms at the same time a delegated legal order, part of the sovereign legal system of the fifty-nine other States. The primacy of municipal law is incompatible with the generally accepted notion of international law as regulating the relations of co-ordinated and equal States. The very conception of co-ordination and equality logically presupposes the existence of a higher authority establishing and realizing the relation of equality. In addition, the primacy of municipal law is inconsistent with many generally accepted rules and principles of international law, including the generally recognized rule of the continuity of the State notwithstanding the legal break through revolution—a continuity which can be secured only by dint of assuming the existence of the primacy of international law bridging the gap between the old and the revolutionary legal order.

However, although the sovereignty of the individual State is a bad fundamental rule, it is, as mentioned, a possible one. Kelsen himself leaves no doubt as to his preference for the hypothesis of the primacy of international law not only for the reasons stated but also because the initial hypothesis and the choice between the primacy of international law and that of the law of the State are in the last resort a matter of one's philosophy of life and because he has no hesitation in expressing his preference for a particular philosophy of life. The doctrine of the primacy of municipal law—a doctrine which regards the national

sovereign State as the source of all legal authority and the other States as delegated and recognized by it—is like that of the subjective theory of knowledge in epistemology and ethics, which in order to comprehend the world begins with the ego, and regards nature as the ideal creation of the individual and the world of values merely as the product of his will. The theory of the primacy of international law is like the objectivitistic philosophy of life which in order to reach the individual unit begins with the world as a whole by presupposing an objective reason; the willing and perceiving individuals are merely the ephemeral expression of that objective reason. But just because they are the emanation of the highest world reason they confront one another not as estranged and incomprehensible one to another but as co-ordinate and uniform personalities before that World Being who alone is sovereign. Kelsen does not urge the student to accept his philosophy of life, but he shows that the legal fundamental rule which is based on subjectivistic philosophy leads eventually to the negation of law and of the possibility of legal science just as the primacy of State law leads to the negation of international law and to the affirmation of mere force.

V. *Natural Law and Positivism*

Critics have pointed out that Kelsen's predilection, in deference to a definite philosophy of life, for the theory of the primacy of international law constitutes an acceptance of natural law pure and simple. Kelsen, to whom natural law is anathema, answers that he has recognized the juristic possibility of the alternative doctrine. However, it is permissible to doubt whether the recognition of the alternative possibility is more than verbal. To say: 'You may adopt the sovereignty of the State as the initial hypothesis; you may even, at the cost of being illogical and ignoring principles which you yourself profess, build a legal system on this basis; but your approach ultimately makes legal knowledge impossible and amounts to an affirmation of

force'—to say this is not to leave to an intelligent mind much scope for choice. One is therefore apt to inquire whether there has not, by a back door as it were, crept into the cast-iron logic of the system the ghost of natural law. Kelsen would deny it. For, as already stated, the rejection of natural law is the ever-recurring theme of his teaching. It is the argumentative starting-point; it is the test of the purity of the pure science of law. Natural law, as Kelsen conceives it, is based on the assumption of a natural order whose rules—unlike those of positive law—are valid not because they are made by a human authority, but because they originate from God, Nature, or reason, and are therefore just and adequate. The validity of the norm of natural law is thus absolute; the validity of the norm of positive law is assumed inasmuch as it is based on the hypothetical fundamental rule. Juridical science can assume the validity of only one of these systems. On no account can it regard both as valid. Juristic knowledge cannot accept a position in which the same conduct is governed by a rule of positive law which says '*a* shall be' and by a rule of natural law which says 'non-*a* shall be'. The logical rule of contradiction applies also in the normative sciences. The two systems are so fundamentally heterogenous that Kelsen doubts whether there is even possible between them a relation of delegation without the delegated legal system losing in the process its specific characteristics. But the rejection of natural law is the result not only of the striving for methodological purity. It is deeply rooted in his relativist and secular philosophy of life. It is the result of the conviction that natural law is due to the tendency, ever dear to the human mind, to duplicate the objects of knowledge by picturing entities—'the thing in itself'—existing behind the objects of actual experience and independent of human reason and senses. This tendency of metaphysical-religious dualism is in Kelsen's view the result of man's lack of confidence in his own powers. It bids him to regard the direct objects of experience as an imperfect picture of a reality which is for

ever inaccessible to his perceiving knowledge. The same tendency exists in the sphere of values. As the metaphysical philosophy of nature pictures the world of experience as an inaccurate rendering of a transcendent reality, so the natural law philosophy of State and law regards positive, valid, and true law not as a free creation of the human legislator and judge but as an imperfect attempt at reproduction of the law in itself, of a natural law above the positive law. The rejection of natural law is for Kelsen tantamount to the affirmation of the dignity and autonomy of man.[1]

The scope of this lecture has not permitted any detailed attempt at a critical examination of Kelsen's doctrines, but an exception may fittingly be made in the matter of his attitude to natural law. The reason for this exception is that this aspect of his teaching is, it is believed, a theory superadded to the main structure of his doctrine—principally for the sake of argumentative advantages, but ultimately to the disadvantage of the whole system. It is of importance that the prominence which he gives to his rejection of natural law should not be regarded as the outstanding feature of the system of the pure science of law.

It is somewhat surprising to find that although Kelsen discusses the problem of natural law with great learning and acumen he does not say what is the substance of natural law, as distinguished from its formal attributes. These formal qualities of natural law are—Kelsen tells us—that it is not posited deliberately by man, but finds its validity in God, Nature, or reason; that, therefore, it needs no compulsion for its realization; that its validity is absolute, whereas that of positive law is hypothetical and assumed with the help of the fundamental norm which itself has not and cannot have a legal foundation; that,

[1] For a most stimulating presentation of the problem see his monograph entitled *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928).

whatever may be the claims of a 'natural law with changeable contents', it is in its essence unchangeable and eternal; and so on. But Kelsen makes no attempt to analyse what is natural law and what are the problems and incidents of its application and incorporation in the body of positive law. Is it natural justice? Or the reason of the thing? Or general principles of law distinct from concrete positive rules? Or public policy? Or morals generally? Or those regulative principles of legislation and administration of justice variously conceived by various schools of law, like the securing of freedom, or of cultural development, or of a maximum of needs? Kelsen does not answer these questions. But, it is submitted, an attempt to answer them would necessarily have shown that the significance of the idea of natural law is not only that it can be abused for political reasons or that it disturbs the purity of legal science.

It would show that the rejection of natural law may not always be consistent with the positivist idea. As a matter of legal experience there takes place constantly a process of incorporation of natural law by positive law. Kelsen argues that, given the absolutely heterogenous nature of the two systems, such a delegation is not possible. Like Zeno's paradox on the Moving Arrow, his reasoning may be difficult to analyse. However, dismissed it must be as contrary to experience. Positive law refers to and incorporates, in various forms, extra-legal rules which, but for the fear of flouting suspiciously general disapproval, we might find it quite convenient to call by the name of natural law. This process of delegation will be found in the codes of many a country expressly referring the judge, in the absence of applicable provisions of the law, to natural justice, to principles of good faith, or to general principles of law.[1] The Swiss Civil Code lays down expressly in its first Article that when neither positive law nor custom provide in the opinion of the judge a sufficient basis for decision he ought to decide the case as if he were

[1] See, for instance, Article 7 of the Austrian Civil Code.

a legislator, and, in doing so, to be guided by tradition and recognized legal doctrine. But Kelsen tells us that 'positivism rejects decisively the specifically natural law view that legal science is a source of law'.[1] This is a typical instance of positivism ending in disregard of positive law—an occurrence which is as frequent in municipal as in international law. However, it is not in specific statutory provisions that this process of delegation manifests itself most conspicuously. In the daily activity of courts homage is paid to the fact that law is the realization of socially obtainable justice—which means of the socially obtainable natural law. We may have abandoned the theory that statutes repugnant to natural justice are void, but that does not mean that we have ceased to shape positive law and to interpret it, sometimes out of recognition, by ideas for which the term natural law is an elastic and convenient expression.

In so far as positivism disregards this phenomenon it becomes a dogma divorced from its own premises and from actual practice. It also becomes divorced from the general trend of legal thinking. The manner in which judges have recourse to the 'law above the law' or to the 'law behind the law' in order to obliterate the gap between law and justice has been for a long time the persistent and central theme of legal philosophy not only in England and America, but also on the continent of Europe. This is the problem of reconciling the antinomy of rule and discretion, of security and justice, of stability and change. But it is a problem which is outside the range of Kelsen's writing. He disposes of it summarily by saying that the rules and principles resorted to by the judge in the exercise of judicial discretion are not rules of positive law and therefore are of no interest to the pure science of law.[2] But is it not true to say that by authorizing judicial discretion positive law has incorporated in advance the indeterminate body of rules and principles upon which the judge falls back in the exercise of his

[1] *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), p. 70.

[2] *Juristischer Formalismus und reine Rechtslehre* (1929), p. 17.

function? In any case there is no compelling reason for reducing legal science to a logical analysis of the existing legal materials. There is no justification for denying the name of legal science to the investigation of the relationship between law and justice, or—and this is the same thing—between natural justice and positive law. There is no watertight demarcation between the science of law and philosophy of law as Kelsen would have it. The dynamics of law—i.e. the processes of its creation and application—are as important and as suitable for scientific investigation as the law conceived as a concrete product. A legal purist like Austin regarded the science of legislation as a juridical science *par excellence.*

Pure positivism is self-contradictory for the simple reason that it takes into account only one part of legal reality. In so far as the initial hypothesis of a positivist system claims to be divorced entirely from the element of natural law, the claim is not justified, seeing that that element is contained in the existing law and that the initial hypothesis is admittedly framed so as to embrace as much as possible of actual legal experience.[1] Kelsen himself admits that some natural law—although only the barest minimum of it—is contained in the very idea of the initial hypothesis, i.e. in the postulate of a self-consistent order. He chooses to call it a transcendal-logical natural law for the reason that it is devoid of any element of material justice. Perhaps it would not be difficult to argue that the very assumption of a unity of the legal ordering involves an element of justice, be it merely the justice of a peaceful order. This latter consideration is probably at the basis of the positivist recognition of the existing legal authority as actually obeyed. It would be difficult otherwise to comprehend Kelsen's proud insistence that the initial hypothesis transforms power into right. But for its peace creating effectiveness the achievement would be of doubtful value. If there existed an effective international order it might be possible to secure in the fundamental

[1] See above, p. 110.

hypothesis of municipal law some element of material justice by the simple means of international law refusing to recognize a municipal system which is lacking in certain minimum standards of justice. At present there is no such international authority, and, recognition being a matter for each individual State, international law recognizes a State, i.e. its legal order, on the sole basis of actual power, that is to say, of habitual obedience to the successful authority. Peace and authority and government are in any case better than anarchy. This *désintéressement* of the international society in the quality of the bases of the municipal system is not necessarily permanent. It is a function of the degree of integration of the international community. But in the meantime an initial hypothesis transforming power into right undoubtedly constitutes, juridically, the basis of a peaceful order.

Kelsen's choice of the fundamental hypothesis in international law shows that some measure of ethical postulate may be unavoidable. The gap between the principle *pacta sunt servanda* and the actual practice of States is too wide to permit the unqualified statement that there is a close correspondence between the fundamental hypothesis and the typical manifestations of international life. For, however large may be the measure of observance of international obligations in time of peace and in minor matters in a society in which freedom of action is the rule and legal regulation an exception, in questions of importance the rule *pacta sunt servanda* is still a postulate. On the other hand, the formulation of the fundamental hypothesis is open to criticism inasmuch as it seems to confine international obligations to the express will of States as manifested in *pacta.* While it thus bases the binding force of international law as a whole in an objective rule independent of the will of States, it is still in the chains of the orthodox positivist theory which refuses to recognize any source of international obligations other than the clearly expressed will of States.

Kelsen's dislike of natural law is largely influenced by

the view that natural law may be and has been abused for political purposes in a manner not always consistent with progress or justice. We must respectfully decline to follow Kelsen in this respect. Undoubtedly, like everything else, natural law lends itself and has lent itself to abuse. Historically it has more often than not served as a justification of the existing legal order; it has justified not only private property but also slavery and war. Those who look forward to a natural law revival of international law ought to temper their enthusiasm by remembering that after all natural law has produced not only Grotius but Vattel. It was Vattel's book and not that of Grotius which supplied the text for the practices and dispatches of chancellories and foreign offices in the last two centuries. But Vattel's treatise was entitled *Le Droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. However, exaggeration and abuse ought not to determine the fate of an otherwise beneficent idea. *Ab abusu ad usum non valet consequentia*. We would rather retain natural law with its possible abuses than cut off the branch of law from the tree of justice. We would rather err in pursuit of a good life for all than glory in the secure infallibility of moral indifference. It is true that justice is invoked by selfish interests, but that is a poor reason for dispensing with it altogether. It is true that the 'general good'—another expression for natural justice—is frequently appealed to by partisan interests, but that is not a reason for denying its existence or for asserting that the conception of a legal order realizing the general good of a community on the basis of solidarity of interests is natural law incarnate. It may be that—as Kelsen assumes—the content of a positive legal order is only a compromise between conflicting group interests of which ultimately none is fully satisfied and none totally defeated, but if this is so it is because natural law and natural justice have consciously or subconsciously played their part. The positive legal order is not the result of a physical balance of forces. We may sympathize with Kelsen's insistence on

the dignity of man—this is one of the philosophical reasons underlying his attitude to natural law—but, to say the least, we may doubt whether human dignity is involved at all. Affirmation of the autonomy of man need not necessarily result in ethical agnosticism. And frankly, it is not suggested that Kelsen aspires to or succeeds in maintaining his moral relativism. There is, throughout his writings, behind the dialectical and abstract form of the pure science of law, a prophetic pathos—from what other source could there have sprung an iconoclasm so powerful and so creative—which will remain an abiding source of inspiration and which suggests that his ethical relativism is in itself dictated by the moral idea.[1] Kelsen insists that he has always kept his legal science apart from his moral *Weltanschauung*. But we doubt whether this is so as a matter of fact and whether it ought to be so as a matter of method.

I have dealt with this point at some length because there is a danger that this aspect of Kelsen's doctrine may deprive his teaching of the effectiveness to which it is entitled. Kelsen's criticism of the established doctrines is effective not because he has shown them to be natural law, but because he has proved that they are inconsistent with the admitted and necessary assumptions of law. This is the reason why he ought to be able to dispense with the doubtful weapon of the imputation of natural law to anything he disapproves. He finds himself in company which otherwise he may not find congenial. But a slight retreat would strengthen the position as a whole. He has only to admit—as every positivist lawyer ought to do in justice to himself—that positive law has always incorporated and does incorporate ideas of natural law and justice. There would, on our part, be no difficulty in admitting that natural law thus incorporated has ceased to be an independent system and has become part and parcel of positive law. We do

[1] For a confirmation of this view the student is invited to read the concluding pages of his *Vom Wesen und Wert der Demokratie* which, it is submitted, belong to the best that political literature has produced.

not mind if natural law has served a good cause at the expense of its separate existence. But we will mind if a purely negative attitude towards the perennial source of legal justice succeeds in diminishing the effectiveness of a great contribution to the cause of law and—we may say this as Kelsen is not here to correct us—to the cause of justice.

FRANÇOIS GÉNY

By B. A. WORTLEY

I

IN a paper recently read before the University of London Law Society, Sir Frederick Pollock pointed out that sixty years ago when he was called to the Bar, English lawyers were, 'with one or two illustrious exceptions', completely insular in their outlook.[1] The 'illustrious exceptions' had penetrated into the remote fields of Roman law and continental jurisprudence and had brought back with them the seeds of a learning 'which old-fashioned practitioners regarded as eccentric and would have liked to think useless', but which nevertheless took root and, in due time, 'bore the fruit of judgements now recognized as classical'.[2]

In the light of these words the present writer feels that no apology need be offered for this short survey of the work of an eminent French jurist who is responsible for a most complete and luminous account of the bases of modern French private law. Gény's first, and perhaps to Englishmen, his most interesting work, is the *Méthode d'interprétation et sources en droit privé positif*, first published in 1899, just before the German Civil Code came into force. It may be surmised from the copious references throughout this work that Gény's wide knowledge of current German literature was not without effect in determining his approach to French law; this, too, may account for Gény's insistence on the value of custom as a source of law. The insistence on the value of customary law, so novel to the French lawyers of the past century, is indeed, as we shall see, one of the striking features of Gény's writings. The conclusions established by Gény in the *Méthode d'interprétation* remain substantially unaltered by the passage of thirty years. Indeed, in view of recent

[1] xlviii. *L.Q.R.* 37. [2] Ibid., p. 38.

tendencies in legal development in England the work is probably now of greater interest to Englishmen than it was when it was first produced: the section dealing with the interpretation of written law[1] is an especially valuable summary of a century of French experience of codified law. The second edition of the *Méthode d'interprétation* contains valuable additional notes on modern French, Belgian, and German developments in legal interpretation. The main theses contained in this work were further elaborated and supplemented by Gény in his four volumes, *Science et technique en droit privé positif*, published by him at intervals between 1913 and 1924. The earlier work is a plea for a revision of the traditional French methods of interpretation of law which the author demonstrates to be out of harmony with the actual requirements of life; the later work deals in detail with the problem of providing a new method of 'free scientific research', to replace the traditional lines of legal development and interpretation. Volume ii of the later work is a particularly interesting criticism of the theories of modern continental jurists such as Hauriou, Kohler, Stammler, Duguit, Boistel, and Cathrein. Of Gény's two principal works the earlier is probably the one which will be of greater interest to English lawyers who are more likely to profit by reading Gény's admirable exposition of a hundred years' experience of codified law in France, his general theory of sources, and his broad conception of free scientific research, than by reading his discussion of the technical problems of French civil law which a change in methods of interpretation may raise.

The present paper will therefore consist of a short account of Gény's first work and of occasional comparisons between the method of interpretation set out therein and current tendencies discernible in the interpretation of English law. An attempt will be made to explain Gény's underlying philosophy but no attempt will be made to label him. Jerome Frank, in *Law and the Modern Mind*,

[1] Vol. i, pp. 240–316.

says he regards Gény as a realist. Dean Pound regards him as a neo-scholastic. Readers of this paper will, it is hoped, be able to form their own conclusions as to Gény's position in legal thought.[1]

II

Professor Goodhart pointed out in his paper on 'Modern American Interpretations' that a legal system can best be understood in the light of the conditions under which it has grown up. The originality of Gény's method can indeed only be fully appreciated after some consideration has been given to the growth of the modern French legal system. It is proposed, therefore, to begin this paper by a short account of Gény's sketch of French legal history since the Revolution.

In the troubled times at the close of the eighteenth century and at the beginning of the nineteenth century, so strong was the feeling of revolutionary romanticism and so keen the desire for order and unity in France, that the sole aim of the reformers was to produce a code of laws applicable to all persons alike throughout the length and breadth of France; this was to lead to a new era of democratic freedom. The great illusion of those days was, as Gény points out,[2] the belief that the culminating point of progress was at hand, and that men could view the future with a sure eye and, by the exercise of reason, make laws that would hold good for all time to come. It was in this frame of mind that the revolutionaries thought that they could put what they understood to be the law of nature into the cold storage of a verbal formula. According to Montesquieu[3] the judges of the law-courts were to be mere mouthpieces for declaring the law imposed by the legislature on all the subjects of the State. The law was to be reformed, harmonized, and stereotyped in the same way

[1] For a critical appreciation of Gény by a neo-scholastic *vide* Jean Dabin, *La Philosophie de l'ordre juridique positif*, p. 302 et seq.

[2] *Méthode d'interprétation*, vol. i, p. 75.

[3] Gény, op. cit., vol. i, p. 76.

that the State was to reform, stereotype, and harmonize the system of weights and measures. But it was soon realized that the judges might, even with almost perfect laws, possibly fall into error and occasionally fail to deliver the correct judgement in a case that came before them. Two judges might give totally different solutions in respect of the same or similar cases. Truth being in essence one and not diverse, some means had to be found, even by the earliest reformers, for correcting patent discrepancies in judicial decisions. It was not possible under the French system to apply a former decision, without discussion, to a particular set of facts merely because the former decision was a binding precedent; no doctrine of *stare decisis* was to be permitted. The doctrine of separation of powers, consecrated in 1790, gave the legislature the sole right to legislate, and accordingly two institutions were established to correct errors on the part of the judges: the scheme of legislative reference, and the Court of Cassation.

The scheme of reference to the legislature as first established, on the one hand, authorized the judges to remit a doubtful point of law to the legislative authority where the doubt arose from the silence, obscurity, or insufficiency of the text of the law (*référé facultatif*), and on the other hand, compelled the judges to refer to the legislative authority in cases where a flagrant contradiction of decisions revealed a gap in the law (*référé obligatoire*).[1] This at first sight would seem to be an obvious way of remedying defects of the law. But a reference to the legislature is a very cumbrous way of abrogating an effete statutory enactment. The recent English case of *Orpen* v. *Haymarket Capitol and others* (47 T.L.R. 575), and the consequent Sunday Performances (Temporary Regulation) Act, 1931, and the President of the Board of Trade Act, 1932, are telling examples of this. French experience, too, soon proved that legislative reference was too cumbrous a system to work successfully. Indeed the *référé facultatif* was abolished by Article 4 of the Civil Code, which pro-

[1] Gény, op. cit., pp. 78–9.

vides that any judge who refuses to adjudicate on the pretext of the silence, obscurity, or insufficiency of the law might be proceeded against for a denial of justice. This provision may be regarded as opening up the way for some measure of judicial interpretation. Nor did the *référé obligatoire* fail to result in the delay of justice and, so far from preventing the infringement of the doctrine of separation of powers, actually encouraged such infringement by causing what was really judicial work to be done by the legislators.[1] In 1837, therefore, the *référé obligatoire* was abolished, and a further opening was provided for some measure of judicial interpretation.

The second institution created in 1790 to work along with the Code and the system of legislative reference is still in existence to-day: a fact which, as we shall see, is eloquent testimony to the accuracy of Gény's analysis of the development of the French legal system. This institution is the Court of Cassation. According to the intention of its founders this court was to be a body formed to maintain discipline amongst the judges. It was to break or annul judgements pronounced *contrary to a text of the Code*. Again it will be observed, the underlying theoretical principle was that the Code was to suffice for all ordinary needs of life, but once more the existence of judicial discretion is impliedly recognized. It is still necessary to base an application to the Court of Cassation on the ground of a false application or a violation of some text of the Code, and even to-day, in civil matters the function of this court is only to annul a wrong decision, and to send the case back to another branch of the High Court. It will be readily appreciated that this negative function of the Court of Cassation has been a factor which has militated against the formation of a body of binding precedents based on a definite hierarchy of courts after the English style. The suggestion may also be hazarded that this character of the Court of Cassation also accounts for the comparative infrequency of the delivery of long reasoned judgements by

[1] Gény, op. cit., p. 87.

the Court. Gény is, however, careful to point out that this power of annulling decisions on the ground of a false application of a text of the law was soon recognized to give a wide discretion to judges in the matter of interpretation, and he quotes a dissertation by J. B. Sirey[1] in 1824, to the effect that there was a 'cassation' whenever there was an infringement of the customary rules of construction, the traditions of the bench, or the philosophy of judicial decisions (*philosophie de la jurisprudence*). The growing realization of the need for some measure of judicial interpretation paved the way for the two great reforms of 1837; first, the abolition of the *référé obligatoire* already referred to, and second, the enactment which provided that after a second 'cassation' of a judgement in any matter had been granted for the same reasons as the first 'cassation', the third reference to the High Court following thereon should bind such third court to follow the lines indicated by the Court of Cassation. Thus was the power and influence of the Court of Cassation increased to an extent scarcely conceived by the first reformers. As Gény has pointed out, 'le résultat de l'évolution historique, qui vient d'être parcourue, se montre dans la plus franche contradiction avec son point de départ juridique'.[2] In other words, what has been called the 'slot machine' theory of judicial interpretation proved to be impossible of application. A body of case law 'jurisprudence', based on judicial interpretation of the Code, has grown up and the respect now commanded by the Court of Cassation has lent increasing force to its 'jurisprudence'. The disciplinary body has become an appellate court. Gény's work is an attempt to face facts and to furnish a workable method of interpretation of the law enunciated over a century ago, to bring it into harmony with changed social and economic conditions, and to provide for the resolution of legal problems which would not have been anticipated by the first reformers.

[1] Gény, op. cit., p. 93.

[2] Gény, op. cit., p. 95.

III

Gény directs a strong fire of criticism on the well-entrenched system of logical interpretation of the Code. The tradition that the Code need only be interpreted logically to supply an answer to any legal problem is easily understandable in the light of the dominating ideas of the first reformers, the all-sufficiency of written law, the rigorous separation of powers, and the disciplinary character of the Court of Cassation. Experience in France showed that marginal cases, neither foreseen nor regulated by the Code, were bound to occur from time to time, and that logic alone was incapable of satisfactorily filling up the gaps left in the law by the insufficiency of the text of the Code.[1] The danger of an exclusively logical interpretation, says Gény, is that such an interpretation tends to endow with a permanent objective reality concepts which are really purely provisional and subjective by nature. This logical method of interpretation started *a priori* from the assumption that the whole system of positive law is contained in a limited number of logical categories, predetermined in essence, regulated by inflexible dogma, not susceptible in consequence to be modified to meet the changing and varied exigencies of life.[2] In England we have never been dazzled by the thought of possessing a complete and perfectly cohesive system of written law comprehending the major premise of every judicial process of reasoning: it is true that in the minds of great judges of the past, even as late as Lord Mansfield, the common law was regarded as identical with reason, as an ideal system which could always be discovered by the judges and applied to facts in order to produce justice, but it is submitted that during the past hundred years the prevailing method of interpretation of the common law has been one of patchwork-like empirical development from the accumulated precedents and sources of law left to us by

[1] Gény, op. cit., p. 195.

[2] Gény, op. cit., p. 129.

past generations,[1] a development from inside, and not, by way of searching for the principles of an ideal system of law, a development from outside. Of late years in particular, the imperfect and complicated state of our fragmentary legislation and our case law has been so obvious that Englishmen have never been in danger of believing in the existence of an artificial logical paradise where the law is applied by the mere exercise of reason, by arguing from premise to conclusion on given facts. Instances have occurred in recent years of judges declaring the common law to be contained in the cases decided up to date, and to be incapable of further development to meet even the most crying of social needs; judges have indicated that any changes in the law may only be brought about by legislation.[2] The dangers of any formalistic view of legal development and the inconveniences of any system of legislative reference have been clearly indicated by Gény, and for this reason alone Gény's work is of more than academic interest to Englishmen.

Gény's revolt against an excessive formalism is clearly understandable when it is realized that for him the aim of 'jurisprudence', or judicial exposition of the law is 'à l'aide du vrai découvrir le bien.'[3] According to Gény the legal system of a country should tend to realize in human affairs, on the one hand, an ideal of justice, and on the other hand, an ideal of utility. To put the matter in other terminology, the legislator and the judge are under a double duty of justice and charity towards those with whom they have to deal. Gény, Edouard Lambert,[4] and an important body of modern French writers, regard the law as essentially a social science. The law should not, they say, be made an

[1] We seem to have been in danger of developing the state of mind evinced by the authors of the Valentinian Law of Citations.

[2] See, for example, the dissenting judgements of Lords Buckmaster and Tomlin in *Donoghue* v. *Stevenson* [1932], A.C., and contrast the judgement of Lord Atkin in that case referred to hereafter.

[3] Gény, op. cit., vol. ii, p. 103.

[4] *Vide*, for example, *L'enseignement du droit en France et aux États Unis*, by Robert Valeur, and *L'enseignement du droit comme science sociale et comme science internationale*, by Ed. Lambert.

abstraction capable of development and application in the same way as mathematics.

Gény's method has of course received its share of criticism. Raymond Saleilles, for example, has pointed out that in spite of its defects, the old formal method of logical development had the advantages of certainty, order, and objectivity, and that a method which produces such advantages is not to be lightly despised or discarded.[1] Saleilles shows that there had grown up in France an extension of the traditional method of interpretation. This new method was an attempt to interpret the Code by a rational, as opposed to a purely logical method, in harmony with equity and the needs of practice by providing a wider and freer construction of the texts.[2] This development of the traditional method did not appeal to Gény to whom it seemed to be a fictitious extension of the will of the legislator. The suggestion that the interpretation of a written law should vary according to the time of its application did not meet with Gény's approval. The legislator could not have more than one intention with regard to the same thing at the same time, that is if he had any intention at all. Truth is constant by definition and not relative according to time and place.

IV

What then is Gény's method? Paradoxically he adjusts the law to the changing circumstances of life, not by any extension of the Code, but rather by restricting the Code within proper limits. As Saleilles has said, Gény's method may be stated epigrammatically as being 'par le Code civil, mais au delà du Code civil', while the thesis of Saleilles' school may be stated to be, 'Au delà du Code civil, mais par le Code civil'.[3] Both schools admit that any gulf between the terms of the Code and the requirements of the changing world of facts must be bridged by the

[1] Gény, op. cit., Introduction by R. Saleilles, vol. i, p. xviii.
[2] Ibid., p. xviii ad fin. and p. xix.
[3] Op. cit., Introd., p. xxv.

judges. It is the judge who can see that justice is done as far as possible in every case. Judicial discretion cannot be dispensed with, as was once imagined, and is of vital importance in deciding cases uncovered by legislation or other authority. The law is the raw material for the judge to work on, and Gény is concerned with surveying and tabulating this raw material so that it may be used scientifically and with precision, so that it may remain in harmony with the actual needs of life without losing the benefits of certainty and objectivity given by the old methods.

Gény defines the primary source of law, the written law, as the will of a determined social organ embodied in a verbal formula which determines, limits, and defines its content, in order that it may be imposed on all. Gény insists that the written law must be carefully followed by the judge interpreting it, and it must be regarded as subsisting until it is abrogated by another written law.[1] In general, no custom can be admitted which is contrary to the written law.[2] From these propositions English lawyers are not likely to dissent.

Having rejected any avowed extensive or restrictive interpretation of written law, Gény goes on to insist that the only way to arrive at the intention of the legislator is to put oneself in the place of the legislator at the moment the law was formulated, and, as a logical consequence, it becomes permissible to examine the work of preparatory commissions and parliamentary proceedings in order to ascertain that will. Sometimes it will appear that the verbal formula employed by the legislator is too wide, sometimes indeed, it will appear too narrow, according to the felicity with which the law has been expressed;[3] but in general this method will be found to be a safe way of preventing any fictitious extension of the legislator's intention and to restrict the scope of an enactment to circum-

[1] Gény, op. cit., vol. i, p. 249.
[2] Gény, op. cit., vol. ii, p. 403.
[3] Gény, op. cit., vol. i, pp. 298–9.

stances foreseen by the legislator. In this way the judge will be able to recognize and to deal with cases not provided for by the written law on lines to be indicated hereafter.

From this method of interpretation it follows, says Gény, that once the express conditions of fact settled by the legislature as being necessary before a statute may operate, are no longer in existence, the statute becomes merely inapplicable. Gény pushes his point farther, and suggests that written law becomes equally inapplicable when the conditions of fact which the legislature implied as necessary for the operation of the statute are no longer in existence; that is when the social conditions implied in the statute have changed, the statute should fall into desuetude. This, from an English lawyer's point of view, will probably seem to be a less acceptable assumption than the first-mentioned conclusion.

At this stage it may be interesting to consider what is the English equivalent to the 'written law' discussed by Gény, and how far Gény's principle of interpretation is applicable to that law. Statute law is the obvious example of English written law and most nearly corresponds to that indicated by Gény. But is this all? It is submitted that Gény's theory of sources will be better appreciated if written law is deemed to include not only statutes and statutory rules and orders but also binding judicial precedents. A court which gives a decision that becomes binding on other Courts by reason of the doctrine of precedent is in effect a social organ making the law, and in finding the *ratio decidendi* of a decision we are merely interpreting the expression of the will of that social organ and isolating that will from what is often a somewhat cumbrous verbal formula. So far as case law is concerned it is difficult to escape from the conclusion that in interpreting binding precedents we do in fact follow Gény's method of interpretation, and that when we avoid applying a precedent we do so by referring to the express or the implied conditions of fact on which the decision was based.[1] It is when

[1] See, for example, the numerous cases on Restraint of Trade where

we come to statute law that we find a great divergence between English tradition and the method of interpretation suggested by Gény. The straightforward, unambiguous statute presents no difficulties; literal interpretation can be successfully employed; the intention of the legislature is apparent. A literal interpretation has, however, been insisted on in England, even though changed social conditions have rendered an old statute unduly harsh, judges and juries have preferred to resort to fictions rather than to declare a statute to be inapplicable by reason of changed social conditions. A ten pound Bank of England note has been found to be worth 39s. in order to avoid the scandal of hanging a man for so slight an offence as stealing such a note.[1] The English tradition has been to treat the interpretation of a civil statute in the same way as the interpretation of any other formal deed or document.[2] And this in spite of the fact that a statute usually lays down a general rule for all time, whereas a private document merely regulates the rights of the parties to it which are often of a purely personal and transitory nature. The analogy of interpretation of a statute and an ordinary deed is clearly borne out in the rules that the recitals of a deed cannot control the clear words of grant of such deed;[3] that once an agreement has been reduced to a formal deed, the correspondence and documents containing the informal agreement may not be consulted in arriving at the meaning of that formal deed;[3] that a preamble of a statute cannot modify the plain meaning of its enacting words;[4] that parliamentary debates and Royal Commissions resulting in the statute as finally agreed between the Government and the Opposition may not be consulted when arriving at the meaning of Parliament.[5] If from the plain language of a statute it appears that the law has been altered, no suggestion that the statute was merely a consolidating act and

old precedents have been held to be inapplicable by reason of altered social conditions, Smith's *L.C.* 13th ed., vol. i, p. 473 et seq.

[1] Kenny, *Outlines of Criminal Law*, 13th ed., p. 182.

[2] Broom, *Legal Maxims*, 9th ed., p. 362.

[3] Ibid., p. 368. [4] Ibid., p. 365. [5] Ibid., p. 398.

was not intended to alter the existing law will be admitted. This was clearly shown in the recent cases of *Stephen* v. *Stephen*, [1931] P. 197, and *Rugg-Gunn* v. *Rugg-Gunn*, [1931] P. 147, in reference to the Supreme Court of Judicature (Consolidation) Act, 1925. On the other hand, there is a tendency to settle ambiguities arising from the wording of statutes by an appeal to the 'intention of Parliament'. A recent example of this is to be seen in the case of *Morris* v. *Britannic Assurance Co.*, [1931] 2 K. B. 425, where the Court broke away from the usual interpretation of the word 'child' in a legal document, and held that the word 'child' in section 3 of the Industrial Assurance Act, 1923, included both legitimate and illegitimate children, this interpretation being more 'consonant with the object of the statute'. In an annex to the Report of the Committee on Ministers' Powers, produced since this article was first written, Professor H. Laski has put his finger on the weakness of the present English method of interpretation of statutes in the following passage:

'The canons of the historic method now operative seem to me to be defective in a number of particulars: (1) they exaggerate the degree to which the intention of Parliament may be discovered from the words of a statute; (2) they underestimate the degree to which the personality of the judge—what Mr. Justice Holmes has called his "inarticulate major premiss"—plays a part in determining the intention he attributes to Parliament; (3) they exaggerate both the certainty and the universality of the common law as a body of principles applicable in the absence of statute to all possible cases; (4) they minimize the possibility that the judge can, in his work of interpretation, fully operate the principle of *Heydon's Case*[1] and consider the evil the statute was intended to remedy so that their construction may suppress the mischief and advance the remedy. They thus make the task of considering the relationship of statutes, especially in the realm of great social experiments, to the social welfare they are intended to promote, one in which the end involved may easily become unduly narrowed, either by reason of the unconscious assumptions of

[1] 11 Rep. 5 *a*.

the judge, or because he is observing principles of interpretation devised to suit interests we are no longer concerned to protect in the same degree as formerly.'[1]

Professor Laski goes on to suggest a possible remedy for the chief deficiency of our present system of legislation which very often leaves the purpose of an Act of Parliament to be implicit in its provisions, as for example the Industrial Assurance Act, 1923, already quoted, and does not make it explicit by means of a plain declaration of policy. 'The desirable thing is', says Professor Laski, 'to attach to them (Acts of Parliament) an authoritative explanation of intention.' This, he suggests, could be done either by a preamble or by means of a memorandum in explanation of a statute. The necessity of ascertaining and following the legislator's intention at the time of the passing of the Act, is, of course, Gény's first thesis. One of the dangers of refusing to look further than the wording of a statute in order to obtain its meaning is that its wording so rarely conveys a picture of the social conditions taken for granted by the framers of the Act. These social conditions may provide the conditions of fact necessary for the operation of the statute. Whether or not, even an official explanation of a statute will always be to indicate the intention of the legislature at the date of the Act is another matter. Once it is established that Public Acts of Parliament are essentially different in scope from private deeds, the French method of research into preliminary parliamentary proceedings and inquiries seems to be a logical step in ascertaining legislative intention, particularly if it is admitted that the judge is concerned to arrive at the intention of the legislator when an Act was passed, rather than to supply such intention from his own personal views and experience of conditions and events of a more or less distant past.

Englishmen will probably say that there is nothing startlingly original in Gény's appeal to custom as the next

[1] *Report of the Committee on Ministers' Powers*, pp. 135 and 136 (Cmd. 1932).

primary source of law to which the judge must have recourse where the written law fails. In fact, however, custom as a source of law had been neglected in France by the reformers imbued with a belief in the all-sufficiency of written law. Gény is careful to point out that there is no text of modern French law which amounts to a pronouncement for or against legal custom as a means of supplementing or interpreting written law where such written law is obscure or insufficient, and he shows that in spite of the Code, old pre-codification customs continue to subsist and new customs continue to be formed. We need not follow Gény into his discussion with regard to the nature of custom. Suffice it to say that by insisting on the necessity for a long, constant, and notorious usage, and an *opinio juris seu necessitatis* as a basis of any custom, Gény is in substantial agreement with the requirements laid down by English writers for a valid custom.[1] While recognizing custom as a primary source of law and that no custom can contradict a written source of law which is still in force and capable of being applied to facts, Gény points out that where a written law is no longer capable of application by reason of the lack of some express or implied condition of facts necessary for the operation of such law, custom is the obvious source of law that can be prayed in aid to stop the gap.[2] It would seem therefore that Gény intends custom to play much the same part in legal development in France as it does nowadays in England where a custom may supplement the common law but may not be received if it runs counter to a statute or a binding precedent, that is, if it runs counter to the written law.[3]

So much for the two primary sources of law, written law and custom, which bind the Courts *ratio imperii*. A few words must be said about the two secondary or persuasive

[1] *Vide* Allen, *Law in the Making*, p. 102, and Jethro Brown, *The Austinian Theory of Law*, pp. 314–18.

[2] Gény, op. cit., vol. i, p. 410.

[3] See xlvii *L.Q.R.*, p. 51. Professor Chorley's article on 'The Conflict of Law and Commerce', p. 61.

sources of law, authority and tradition, sources which bind the Courts only *imperio rationis*. Of these sources the most important are '*la jurisprudence*' and '*la doctrine*'. As has been already pointed out, the French tradition does not admit of a system of binding precedent, consequently even a well-established line of decisions, '*une jurisprudence constante*', can never be more than the French equivalent of a series of non-binding English precedents. Gény points out, however, that such a '*jurisprudence constante*' may give rise to a binding custom, and thereby to a binding source of law. In its turn '*la doctrine*', that is the theories and opinions of leading text-writers, is a powerful means of establishing '*une jurisprudence constante*'. It is interesting to observe how the close connexion between university law-teaching and the legal profession in France produced great respect amongst practical lawyers for '*la doctrine*'. Perhaps the reorganization and regeneration of university law-teaching in England may have similar results in the future: not that English text-writers have failed to influence the course of legal development here. Westlake, Dicey, and Foote have, for example, in recent times, by means of scientific exposition and suggestion, had a far-reaching effect on the modern development of conflict of laws.

So much for the raw material at the disposal of a judge: the remainder of Gény's principal work is devoted to a discussion of the way in which this material should be handled, to what he calls '*la libre recherche scientifique*'. Cases covered by binding authority are not likely to cause much difficulty, but Gény's theory of free scientific research is of importance when there arises for discussion a case uncovered by binding authority, that is, when there arises a 'marginal case'.

V

The underlying principle of judicial interpretation of the various sources of law revealed by a 'free scientific research' is that the judge should endeavour to decide a marginal case as though he were conforming to an ideal

type of legislation, bearing in mind the two main objects of law, justice and social utility.

'The judge', says Gény, 'asked to enunciate the law, by supplementing the lack of or by bridging gaps in the formal sources thereof . . . should take into account the inspirations of reason and of conscience in order to probe the mystery of "the just", before coming down to the examination of the positive nature of things which will settle its diagnosis and will call into action the principles of reason. . . . There are principles of justice superior to the contingencies of fact, and if facts determine the realization of those principles, they do not contain their essence.'[1]

This attitude, one is tempted to recall, is the attitude adopted by those who were responsible for the development of English equity in the days when equity was indeed a supplementary system designed to effect justice in individual cases and before it became, under the influence of the doctrine of precedent, a system as rigid as the common law. Such indeed, says a recent writer, Simon Deploige, was the attitude long ago suggested by Saint Thomas Aquinas.[2] Gény believes then that there are principles of justice immutable and discoverable by reason from the nature of things, and, even if in the exercise of a free scientific research a judge fails to arrive at an objectively just and useful solution, that does not prevent a really just and useful solution from being discoverable. As Dr. Lauterpacht has pointed out in a recent paper, Gresham's law does not apply to problems of the moral order, the bad currency of

[1] Gény, op. cit., vol. ii, pp. 100 and 101. Gény recalls with approval the poem by Sully Prudhomme, *La Justice*. A couplet from this poem runs:

> Le sens du mot justice enfin je le devine,
> Humain par son but, la justice est divine.

[2] *Le conflit de la Morale et de la Sociologie*, 4th ed., p. 308, note 4 of which contains the following quotations. 'Bonum est, praetermissis verbis legis, sequi id quod poscit justitiae ratio et communis utilitas' (*Summa Theologica*, II^{a} II^{ae} 9. 120, art. 1), and 'Ipse legislator, si praesens esset ubi talis casus acciderit, sic determinaret et esset dirigendum; si a principio praescivisset, posuisset hoc in lege' (*Ethicorium*, v. 16).

legal technique does not drive out the good. Indeed the four volumes of *Science et Technique* consist in a review of the whole field of modern legal philosophy designed to show how modern legal and philosophical material may be used in order to provide by legal means, within a modern system of law, the best possible relation of law to social facts to secure the maximum of human justice and utility. It is interesting to observe that Gény disclaims, as did the founders of modern equity, any attempt to make the judges legislate for future cases, by means of a theory of precedent or otherwise. Although, says Gény, the judge should conform to an ideal type of legislation in deciding marginal cases, he should not seek to give a decision to hold good for future cases, that would be contrary to the doctrine of separation of powers. Where there is no clear law on a matter, the judge should tend to look to actual requirements of facts before him and to give his decision with his eyes on the principles of justice and utility, rather than, as may occasionally happen here, to seek for a decided case, closely resembling the one before him and to obtain an answer to his difficulty only by reasoning by analogy from that case. This system of logical extension of the law without regard to facts indeed closely resembles the traditional French school of legal interpretation which Gény condemned.

Gény states that his teaching is scarcely in accordance with the tendencies developed by all the modern German philosophy and still more accentuated by Anglo-Saxon positivism. This may indeed have been so when Gény first wrote, but one wonders whether strong indications of a change of attitude in the Anglo-Saxon world are not now beginning to be perceivable. And this change of attitude is surely a change in favour of the sociological point of view advanced by Gény. As social conditions change, new problems for which there is no definite written law are bound to spring up. One need only instance the enormous developments in private international law during the past century. It is indeed in this subject more than in any other

that English judges, unhampered by precedent, have tended to make free use of scientific text-writers and foreign legal material when seeking a just solution to the legal problems raised by the novel combinations of facts before them. More and more have they gone back to first principles, to 'doctrine', in matters involving a conflict of laws. If example be necessary there could be cited the development of the doctrine of 'the proper law of the contract' by our Courts. The proper law of the contract is a logical application of the principles enunciated by Dicey in his *Conflict of Laws*, that rights duly acquired should be everywhere recognized, subject to overriding conditions of public policy, and that wherever possible the intention of parties to a legal act should be carried out.[1] This is of course an application of the same principle as that enshrined in the text of Justinian, *suum cuique tribuere.*[2]

These are indeed signs of a reaction from formalism in English law.

The result of an excessive reliance on reasoning by extension from one precedent to another has been recognized by Dean Pound in these words,

> 'The danger in continuing to deceive ourselves into believing that we are merely applying the old rule or principle to a new case by purely deductive reasoning lies in the fact that as the real thought process is thus obscured we fail to recognize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into account all the relevant facts of life required for a wise decision. We shall thus be guided by the "inarticulate major premiss" of Mr. Justice Holmes, and that may be a premiss which if dragged into the light we should, after examination, decide to be unsound.'

Mr. Justice Holmes himself has said, 'I cannot believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantages on

[1] Dicey, *Conflict of Laws*, 5th ed., Introduction, pp. lxv and lxvi, General Principles i, v, and vi.

[2] *Digest*, i. 1. 3.

which the rule then lays down must be justified, they sometimes would hesitate where they now seem confident'.[1] To the same effect we have Professor H. Laski, a political scientist, who as an onlooker may possibly see more of the game of the law than the players themselves—the lawyers, who are more concerned with the rules of the game as it is played at present, than with the game as it could be played; he says: 'Legal rules are always seeking to accomplish an end deemed desirable by some group of men, and it is only by constant formulation of what that end is that we can obtain a realistic jurisprudence.'[2] Recent cases have shown that we are tending to repudiate an excessive conservatism in legal development which a strong tradition of technical and empirical development of case law has bequeathed to us. One could have no more striking contrast of the old and the new legal method of development than that to be found in the judgements given in the House of Lords in the recent case of *Donoghue* v. *Stevenson* [1932] A.C.[3] In this case we find the traditional view expressed by Lord Buckmaster in these words:

'The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit. Now the common law must be sought in law books by writers of authority and in the judgements of the judges entrusted with its administration. The law books give no assistance because the works of living writers, however deservedly eminent, cannot be used as authorities, though the opinions they express may demand attention, and the ancient books do not assist. I must therefore turn to the decided cases. . . .'

The newer point of view was expressed by Lord Atkin,

[1] 10 *Harvard L. R.*, p. 468.

[2] Introduction to *Representative Opinions of Mr. Justice Holmes*, p. xv.

[3] At p. 495, *T.L.R.* This case was decided soon after this paper was first written.

whose opinion was shared by the majority of the Lords of Appeal, in these words:

'I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims which it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.'

Those then are the two voices. We are perhaps on the eve of nothing less than a revolution in legal thought. If this be true the study of writers like François Gény, hitherto pursued in the universities, will become of first importance. The ideal of natural justice has served well in the past in spite of occasional abuses to which it has been subject and signs are not lacking that this powerful ideal may be used with fruitful results in the future.[1] Indeed it may be that, following the lines indicated by Gény and so many others, the 'inarticulate major premiss' in judicial reasoning may become articulate, examinable, and open to the reasoned and constructive criticism of legal philosophers. When this becomes possible we shall indeed be able to boast of a body of 'doctrine', and of a living legal philosophy. In this connexion the path of the universities is plain, it remains for them to pursue it.[2]

[1] Instances of appeals to natural justice are very common in *Conflict of Laws*; see Dicey, op. cit., pp. 456–7. See also *The Report on Ministers' Powers*, pp. 75–80, 99.

[2] For a plea for a body of *'doctrine'*, see the Presidential Address of Professor J. D. I. Hughes to the Society of Public Teachers of Law, 1932.

SIR HENRY MAINE TO-DAY

By WILLIAM A. ROBSON

I

HENRY JAMES SUMNER MAINE was born in 1822 near Leighton. After being a Foundation Scholar of Pembroke College he was appointed Regius Professor of Civil Law in the University of Cambridge at the early age of twenty-five. In 1861 he published *Ancient Law*, the substance of which, one notes with astonishment, had previously been delivered as lectures to the Inns of Court. In the same year he succeeded Macaulay as Law Member in the Council of the Governor-General of India, a position which he filled for eight years. On his return to academic life, first as Corpus Professor of Jurisprudence at Oxford, and later as Master of Trinity Hall, he published *Village Communities* (1871), the *Early History of Institutions* (1875), *Dissertations on Early Law and Custom* (1883), and finally *Popular Government* (1885). He died in 1887, and the lectures which he had prepared as Whewell Professor of International Law were published after his death. One mentions these few facts not from any desire to burden the mind with dates, but because it is impossible to estimate Maine at his true worth without paying some regard to the time when his work was accomplished and the state of knowledge which then prevailed.

Maine is classed among the lawyers. But he was much more than a jurist. He was what is called on the continent a *savant*. His works achieve the unique distinction in English legal writings of forming part of that select literature of universal interest which has to be read, and is read, not merely by all students of law in every land, but by every person making any pretence to a cultural education of any kind. He is, indeed, almost the only English jurist who is widely read abroad.

The recognition which has been accorded to his work

in foreign lands is both natural and proper. For Maine was a man whose culture and outlook were essentially international. He denounced in unmeasured terms the ignorance of Roman law which prevailed among the English lawyers, moral philosophers, and politicians of his day, the effect of which, he pointed out, was to deprive them of any real basis for understanding their colleagues on the continent. It is not without significance that at the very end of his life he turned towards the special study of International Law.

The keynote of Maine's approach was a conscious hostility towards what he considered false assumptions. Throughout his life he was a sworn enemy of the theories of the Law of Nature and the State of Nature, although he admitted that they had exercised a potent influence for good as well as for evil. He opposed tooth and nail the doctrines that all men are brothers and that all men are equal, the falsity of which he held to be demonstrated by every piece of historical evidence in our possession. Above all, he resisted the assumption that the legal and political structure of society either is or ought to be framed by reference to the rational nature of man. His belief in the dominant part played by habit, by instinct, by primitive emotion in the organization of society stands out in sharp contrast with the faith in the essential reasonableness of mankind displayed by John Stuart Mill.[1] To correct these and other false assumptions he started out to create what he called 'the new science'. 'I hesitate to call it comparative jurisprudence,' he wrote, 'because, if it ever exists, its area will be so much wider than the field of law.'

II

The leading ideas which Maine introduced into his work may be divided, broadly speaking, into three groups. There is, first, those which relate to the origin, sources, and

[1] This approach was to receive more sympathetic expression at a later date in the hands of Graham Wallas. The work of Maine and Graham Wallas has a common element, although the conclusions which Wallas drew from his studies of the irrational forces in society were radical and in sharp contrast with Maine's conservative opinions.

development of law in general; second, those which deal with the evolution of private-law doctrines respecting property; third, those which are concerned with political institutions and political theories. The first and last of these groups are those in which he made the most important contribution, and it is to them that I shall therefore devote most attention.

The most far-reaching generalization which can be made about the early sources of law was made by Maine when he asserted that 'there is no system of recorded law, literally from China to Peru which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance'.[1] Roman law is said to be the first example of the separation of law from religion, but the Twelve Tables contain numerous provisions which derive from supernatural belief. It is impossible to find the absolute beginnings of law; it is, indeed, easier to find the origins of lawyers than of law. The earliest lawyers were first of all priests, the original identity of the two professions being shown in the ancient usages of the Hindus, the Celts, the Greeks, the Romans, and many other peoples.[2]

Maine distinguished three stages in the development of law. The earliest is when law is not conceived as a principle enunciated for general application or observance but as a judgement announced to determine a particular issue by a king acting under divine inspiration. The most notable examples of this are the Themistes in the Homeric poems. The only authoritative statement of right or wrong is a judicial sentence uttered *ex post facto*.

The next stage is when the notion of custom is established. The custom is affirmed by a judgement, and the breach of it is punished. The divinely inspired king is superseded by aristocracies or small privileged groups who become the depositaries and administrators of the law without claiming heavenly inspiration for each sentence. These oligarchies monopolize all knowledge of the law. This is the stage of true customary law; it existed before

[1] *Early Law and Custom*, pp. 5–6. [2] Ibid., pp. 26–7.

the invention of writing at a time when the only chance of preserving the customs in a traditional form was to confide them to the care of a privileged order or caste.

The third stage is ushered in by the institution of the codes. This marks the end of the spontaneous development of law. Thereafter, modification can arise only from a conscious desire to improve. After the arrival of codes the distinction between stationary and progressive societies begins to show itself. Progressive societies are few, observed Maine, and rare exceptions in the history of the world. 'Much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given them by their embodiment in some permanent record.'[1] There have been occasional violent revolutions as a result of which laws have been overthrown, but seldom any attempt at gradual amelioration. In the minority of communities which deserve to be called progressive, there is a tendency for social necessities and public opinion to be continually in advance of the law. The well-being of the people depends on the promptness with which the gulf between the two is narrowed. The agencies for bringing law into harmony with public opinion and the needs of the society are (in historical order) legal fictions, equity, and legislation. In olden times, however, even the legislator did not innovate to any large extent. For the most part he did no more than to declare pre-existing law and custom. There was probably little that was new in the laws of Solon, or the Twelve Tables, or the laws of Alfred or Canute or the Salic law.

In this part of his teaching Maine revealed his profound conviction that most men and women detest change of any sort and will resist it to the uttermost. The truth is, he wrote in a highly characteristic passage, 'the stable part of our mental, moral, and physical constitution is the largest part of it, and the resistance it opposes to change is such that, though the variations of human society in a

[1] *Ancient Law*, p. 22.

portion of the world are plain enough they are neither so rapid nor so extensive that their amount, character, and general direction cannot be ascertained.'[1] Yet when the author of *Ancient Law* was called upon to advise the Government of India on practical affairs some years later, we find him warning them of the danger of over-estimating the stability of legal conceptions. They are undoubtedly very stable, he said, but they are not absolutely permanent and indestructible, as some people, including Bentham and Austin, appear to assume. 'Even jurisprudence itself cannot escape from the great law of evolution.'[2] This concluding remark reveals the great influence exerted by Darwin over a mind which needed some theory to explain social progress in non-rational terms.

Maine's leading proposition concerning the development of society is that the evidence brought to light by comparative jurisprudence tends to establish the patriarchal theory of the human race. This theory postulates that society starts with a condition in which the eldest male parent reigns absolutely supreme in his household. His dominion extends to life and death, and he exercises unlimited power over his children and slaves. The flocks and herds of the children belong to the father, and their wives and offspring must obey him. His possessions are at death divided in equal shares among descendants of the first degree.

Thus the family is the unit of society in early times, and not the individual as at present. The *patria potestas* of the Romans is a typical illustration of the sort of power wielded by the head of the family. Ancient law reflects the family basis of early society. It is scanty, because it is supplemented by the despotic commands of the head of

[1] *Ancient Law*, p. 117. Maine's inveterate belief in the dislike of change shown by human beings is manifested in an amusing passage in which he says that even women's fashions pass through cycles which ever repeat themselves. 'The eccentricities of female dress mentioned in the Old Testament may still be recognized; the Greek lady represented by the Tanagra figures is surprisingly like a lady of our time—though without corsets and wearing a parasol as a fixed part of her head-dress; and medieval costumes strongly resemble Paris fashions.'

[2] Appendix to Minute to the Government of India, Grant Duff, p. 60.

the household; and highly ceremonious for the reason that the transactions resemble international agreements between independent sovereign groups rather than the contractual arrangements of individuals.

Maine next proceeded to indicate the manner in which modern society had evolved out of this primitive family stage. The aggregation of families constituted the *gens* or house; a collection of houses formed the tribe; a multitude of tribes produced the commonwealth. At first, consanguinity is not merely the guiding principle, it is the only basis on which any sort of community can take place. No brotherhood was recognized save that of blood relationship. Not only that, but, as Maine believed, there was an implacable hostility between all who were not kinsmen.

'If a man was not of kin to another,' he wrote, 'there was nothing between them. He was an enemy to be slain, or spoiled, or hated, as much as the wild beasts upon which the tribe made war.... It would scarcely be too strong an assertion that the dogs which followed the camp had more in common with it than the tribesmen of an unrelated tribe.'[1]

The assumption that kinship in blood is the only possible ground for the exercise of political functions in common is, then, the starting-point of the history of political ideas. The notion that persons should exercise political or legal rights in common merely because they happened to live within the same area was 'utterly strange and monstrous' to primitive antiquity. It was only through the legal fiction of adoption that this state of affairs came to be modified. By means of this device men gradually ceased to assume that those who were not related to them by blood were their enemies. By this means social relations were transferred from a familial basis to a territorial foundation. The family ceased to be the unit of society and the individual emerged. Status receded and contract became dominant. Nationality, the outstanding characteristic of the modern world, is only a highly elaborated form of kinship not involving blood-relationship.

[1] *Early History of Institutions*, p. 65.

III

Pausing for a moment at this point, it must be admitted that no talent short of genius could have produced a series of generalizations so brilliant, so comprehensive, so illuminating as those of which an inadequate summary has been given above. Nor can a consideration of the state of knowledge existing in 1861, when *Ancient Law* first appeared in literary form, fail to emphasize the extraordinary achievement which that work embodied.

Most of the anthropological knowledge on which we now rely is extremely recent. In 1861, the world had not yet witnessed the formative work of such pioneers as Lewis Morgan, Sir James Frazer, Boas, Tylor, Lubbock, Andrew Lang, Baldwin Spencer, Crawley, Westermarck, Hartland, Seligman, and a score of others who have laid the foundations of our knowledge of primitive man. Even the existence of the Paleolithic Age was not established by de Mortillet until 1869. It is no easy task to recreate in one's imagination the darkness which surrounded a mid-Victorian path-breaker such as Maine, or to realize the limited amount of exact information at his disposal. It is in no ungenerous spirit that I shall indicate some of the defects in Maine's work which later additions to knowledge have revealed.

The discovery of the code of Hammurabi and the codes of the Hittites and the Assyrians have shown us bodies of law which, although far more ancient than the Twelve Tables, are nevertheless mainly secular in character and not interwoven with religion to any marked extent. If these systems of law had been known in Maine's day he could, again, never have concluded so lightly that the codes obtained by eastern societies were established, relatively, much later than those of western peoples.

In the next place, we now know that Maine's conception of primitive life is quite fantastic. Take as an illustration the picture of the savage family given in *Early Law and Custom* (p. 198):

'The strongest and wisest male rules. He jealously guards

his wife or wives. All under his protection are on an equality. The strange child who is taken under it, the stranger who is brought under it to serve, are not distinguished from the child born under the shelter. But when wife, child, or slave escapes, there is an end to all relations with the group, and the kinship which means submission to power or participation in protection is at an end. This is the family (to borrow Sir George Cox's expression) of the wild beast in his den.'

I think it may safely be said that no such savage family ever was on land or sea. The whole construction is a piece of pure *histoire raisonée*. I am not concerned with the debatable question whether primitive peoples, far from being in the state of continual enmity with one another which Maine depicted,[1] are on the contrary by nature peaceful and well-disposed, as Professor Elliot Smith has contended.[2] The real defect in Maine's work arises from the fact that he ignored the immense importance of sympathetic magic in the processes of law-making and law-enforcement among primitive peoples. He observed correctly that the early lawyers were also priests. He failed to observe the magical origin of both kingship and priesthood.[3]

It is this same cause which vitiates the whole of Maine's account of the evolution of criminal law. It has become increasingly clear that in many primitive communities there is in operation a definite system of criminal law whereby offences are punished by means of superstitious practices such as sorcery or magic, the supernatural consequences of taboo, and the device of enforced suicide.[4] Witchcraft, we are told on high authority, is 'the Kafir state engine for the removal of the obnoxious'.[5]

Sir James Frazer has shown us that criminal justice was based on superstition long before jurists had deduced it

[1] 'The universal belligerency of primitive mankind' is more atrocious than anything we can conceive. *International Law*, p. 8.

[2] See G. Elliot Smith on 'the character of natural man' in *Human History*, p. 251.

[3] Cf. Sir J. G. Frazer, *Magical Origin of Kings*.

[4] Cf. Malinowski, *Crime and Custom in Savage Society*, *passim*.

[5] Rev. H. H. Dugmore, *A Compendium of Kafir Laws and Customs* (Grahamstown, 1906).

logically from a theory of retribution. Thus, dread of the ghost of a murdered man led to drastic collective action against the murderer which was conceived as a purification, a process of spiritual disinfection, rather than as a punishment. When the purification took the form of placing the murderer under restraint it was indistinguishable from punishment and became not less effective as a method of deterrence. If a man is to be hanged it is small consolation to be told that the hanging is not a punishment but a purification.[1]

The penal law of ancient communities, said Maine, is not the law of crimes, but the law of torts. 'The person injured proceeds against the wrongdoer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds.'[2] The true position is almost the exact opposite. Early systems of law are concerned not with giving reparation for the loss or damage suffered but with visiting the wrongdoer with injuries similar to those he has himself inflicted. Professor Jolowicz has pointed out that the modern notion of assessing damages quantitatively in terms of money contrasts sharply with the ancient idea of requital in qualitative terms, whereby the penalty is made to fit the nature of the offence rather than the damage resulting therefrom. The governing principle is appropriateness.[3] This comes out most clearly in the *lex talionis*.

It is true that in many early systems of law the person injured or his kinsmen are expected to claim the right of redress and to enforce the sentence of the law. But to call the right which is given to a husband by the ancient Assyrian Code, for example, to cut off the ears and nose of his wife and her lover, a 'civil action for the recovery of compensation' is a misuse of language. The ancient Assyrian laws and the code of Hammurabi are full of

[1] Sir J. G. Frazer, *Psyche's Task*, pp. 151–2. (This has now been reissued under the title of *The Devil's Advocate*.)

[2] *Ancient Law*, p. 370.

[3] H. F. Jolowicz, 'The Assessment of Penalties in Primitive Law', in *Cambridge Legal Essays*, pp. 204–5.

instances where the person wronged is given, not a right of action for compensation, but the right of punishing the offender, which is something very different. Moreover, as Professor Lowie points out, the majority of primitive peoples recognize not only wrongs inflicted by individuals upon individuals, but also outrages which will be resented by the entire community.[1]

In the sphere of civil law Maine also failed to recognize the immense influence of superstition. He observed the ceremonial aspect of the oath. He did not succeed in grasping the legal significance of either the oath or the curse.[2] This is specially notable in regard to the development of the law of contract. No one was more impressed with the immense change in human life wrought by the movement of society from status to contract than the author of *Ancient Law*, within whose pages may be found that celebrated remark on the subject whose truth once appeared so unassailable. But of the essential causes which were instrumental in producing this change he remained profoundly ignorant. Like a good Victorian, he attributed the growth of contractual freedom to an enhanced moral consciousness. He deplored the reluctance of people to recognize the moral advance implied by the modern law of contract, their inability to see that good faith and trust in our fellows are more widely diffused than of old.[3] But we now know from the work of Sir James Frazer and others that the task of making mankind even moderately truthful and reliable has been achieved less through the growth of moral elevation than through the instrumentality of fear and superstition, by means of oaths involving all kinds of supernatural forces and supported by a frightful carnage of human slaughter and animal sacrifice, mutilation, and suffering.[4] Those who speak of the 'sanctity of contract' describe better than they usually know a series of

[1] *Primitive Society*, p. 412.

[2] Jane Harrison, *Prolegomena to the Study of Greek Religion*, 3rd ed., p. 138 et seq.

[3] *Ancient Law*, pp. 306–7.

[4] Sir J. G. Frazer, *Folklore in the Old Testament*, i, p. 392 et seq.

phenomena which they would find it difficult to admire on closer inspection.

In the very same year that *Ancient Law* was published there appeared the work by J. J. Bachofen entitled *Das Mutterrecht* in which a precisely opposite theory of the origin of society was put forward. Bachofen, McLennan, and Lewis Morgan founded a school of anthropologists who maintained that in the earliest stages of society the family as such did not exist. Individual marriage was unknown; promiscuity and uncertain paternity within the group were the general rule, and children were regarded as belonging to the group as a whole rather than as the offspring of a particular family. It is the mother who is important rather than the father. Hence, descent is matrilineal and mother-rights prevail.

The discussion concerning the rival claims of the matriarchal and the patriarchal theories of society has persisted for nearly three-quarters of a century with considerable vigour.[1] Where so many distinguished authorities have disagreed with so much zest and learning it would be impertinent for one who is not an anthropologist to express an opinion on the final result of the controversy, even were it desirable to deprive the prehistorians of so enjoyable an apple of discord. But some mention of the disputation had to be made lest the reader should imagine that this part of Maine's work had received a prompt and easy acceptance. It would not be going too far, however, to say that although neither doctrine covers all the facts, the patriarchal theory sponsored by Maine is consistent with a great deal more of the evidence than the matriarchal theory.

When all has been said by way of criticism the wonder is, to quote Sir Frederick Pollock, not that Maine's results should stand in need of some correction, but that they need so little as they do.[2] Later speculation and research have confirmed many of Maine's leading ideas in a most striking manner. As Sir Frederick Pollock remarks, 'Maine can no

[1] Cf. Lowie, *Primitive Society*, pp. 58–9, 75.

[2] Preface to *Ancient Law* (1930 edition), p. xiv.

more become obsolete through the industry and ingenuity of modern scholars than Montesquieu could be made obsolete by the Code Napoléon'.[1]

IV

In the field of private law Maine made a series of highly interesting and illuminating studies of the evolution of the law of wills and succession, of the legal institutions of private property and of contract. Always and everywhere he sees the law set in the context of the habits of a particular community existing in a particular time and place, whether he is dealing with *res nullius* in ancient Rome or joint ownership among village communities in India or eastern Europe. And yet the historical perspective, a sense of development, the relation between past and present, is always suggested. His general conclusion was that civilization is essentially due to the emergence of rights of private property, and the freedom of action which they made possible, in contrast with the relatively immobile collective ownership which he found amongst all the older forms of village and house communities throughout the Aryan world. No one is at liberty to attack individual property and to say at the same time that he values civilization, he remarked pungently in the Rede Lecture at Cambridge, for the two are inextricably entangled. Civilization, he told his listeners, is the old order of the Aryan world, dissolved but perpetually reconstituting itself under a vast number of solvent influences, the most powerful of which has been the substitution of private property for collective ownership.[2] He realized, nevertheless, that economic competition is a relatively modern phenomenon, and that the unrestricted purchase and sale of land in a free market is not only modern but distinctively Western. It would be interesting to learn his opinion on the modern forms of collective ownership which have supplanted private

[1] *Oxford Essays*, p. 154.

[2] *The Effects of Observation of India on Modern European Thought*, Rede Lecture, pp. 28–30.

property completely in Russia, and to some extent in other countries. Whatever those views might be, they would certainly not be commonplace, for Maine was never commonplace. His interest in economic questions, and in the science of political economy, was considerable.

V

Maine's views on political institutions and political theories are set out at length in *Popular Government*, which appeared two years before his death. The first point he seeks to emphasize is the extreme fragility of popular government. The facts of the modern world, both in Europe and in North and South America, appeared to him to give little support to the assumption that popular government is likely to prove of long duration. Except in a few small States, such as Holland or Belgium, too weak to embark on foreign wars, or the Scandinavian countries, where there is a long tradition of political freedom, he thought experience showed that government in Europe had become more insecure since the introduction of representative institutions. This was not a mere accident but was due to certain definite causes.

The first of these is that democracy is the most difficult of all forms of government, mainly on account of the impossibility of discovering the will of a multitude of people with any accuracy. Maine accepted Bentham's Greatest-Happiness doctrine as a guiding principle for legislation. It is, indeed, he said, the only standard which the legislative power can conceivably follow. But when the mass of citizens is asked to participate in the government for the purpose of promoting its own happiness there is not only the difficulty of obtaining a conclusion from the multitude, but also the problem of ensuring that it will know what its happiness requires or how it can best be promoted. These difficulties are so overwhelming that democratic government could not manage to operate unless it were assisted by certain extraneous forces. The most important of these is the party system. Party, said Maine, is like a religious

creed. Its discipline resembles military discipline. Unfortunately the party system generally leads to corruption in public life, witness the examples of the United States and France. In England, he observed quite truly, we were corrupt until late in the nineteenth century when the Civil Service Commission and the Corrupt Practices Acts were introduced. These were 'heroic remedies', but Maine was doubtful of the result which would accrue from 'borrowing the caucus from the United States and refusing to soil our fingers with the oil used in its native country to lubricate the wheels of the machine'. The corruption of our own time would, according to his prophecy, take the form of 'legislating away the property of one class and transferring it to another'.

The particular danger which Maine believed would lead to the overthrow of popular government was the conflict between the spirit of imperialism which he saw around him, the desire for national power in a military sense on the one hand, and the idea of democracy on the other. Great armies, he remarked with considerable insight, are obviously incompatible with popular government. For the supreme military virtue is obedience, whereas the cornerstone of democracy is the right to censure and to criticize superiors. The maxims of imperialism and democracy flatly contradict one another.

Democracy, in Maine's view, is an inverted form of monarchy. In consequence, it suffers from much the same defects. It is susceptible to flattery. Above all, it is not progressive. The contention that democracy is unprogressive was Maine's chief reason for disparaging popular government. The prejudices of the people, he alleged, are far stronger than those of the privileged classes; and they are also more dangerous, because they are apt to conflict with scientific conclusions. Thus he regarded the notion that 'a wide suffrage could or would promote progress, new ideas, new discoveries and inventions, new arts of life'[1] as 'one of the strangest of vulgar ideas'. He believed

[1] *Popular Government*, p. 35.

that all that had made England famous and wealthy had been the work of quite small minorities. If there had been a popular franchise for the past four centuries, he declared, there would have been no Reformation, no religious toleration, no change of dynasty, no reform of the calendar. The threshing-machine, the power-loom, and the steam-engine would all have been prohibited.

No less pernicious in Maine's eyes was the prospect that democratic government would tend to produce economic equality and thereby to destroy competition. In a passage that bears clear signs of the influence of both Darwin and Spencer he remarked that the motives which at present impel mankind to the labour and pain which produce wealth in ever-increasing quantities, are such as infallibly to entail inequality of wealth. 'They are the springs of action called into activity by the strenuous . . . struggle for existence, the beneficent private war which makes one man strive to climb on the shoulders of another and remain there through the law of the survival of the fittest.' The only alternative to economic competition as an instrument of industrial compulsion is slavery or peonage. The final and most extraordinary charge which he laid at the feet of democracy was that it is incapable of producing aristocracy, a form of political and social ascendancy from which, in his view, all improvement has sprung.

VI

If Maine had not written *Popular Government* it might easily have been possible to suppose that he was a Liberal in his political outlook—assuming that one put out of mind the remarkable tendency of English legal historians, with the great exception of Maitland, to become extreme Conservatives in politics. If, again, he had written it twenty-five years earlier, before his Indian experiences, it might have been a very different work.

We may concede at the outset that Maine's statement concerning the fragility of popular government has been borne out to a remarkable extent in our own day. The

events of recent years in Italy, in Poland, in Germany, in Hungary, and many other countries have demonstrated that Maine was fully justified in asserting that democracy is not only a highly vulnerable system of government, but also that it is wholly incompatible with militaristic aims. Nor is the weakness of dictatorship in Spain any proof that democracy will prove to possess great strength in that country. The difficulty of democratic government is, again, a truth which no one would question to-day.

Despite the fact that Maine took a long view of political institutions in the sense that he surveyed them over an extensive period of time, his conception of their scope was extremely narrow. He conceived the duties of a government to be the preservation of the national existence, the maintenance of the national greatness and dignity, and the enforcement of obedience to law. All this smacks very distinctly of the nineteenth century. There is not a word about the social services, about public health, education, housing, justice, or poverty. If Maine had held a wider view of the functions of the State, he would perhaps have been forced to admit that some of them at least were only likely to be successfully administered under a system of popular government. The author of *Ancient Law* was, however, essentially an aristocrat and a scholar. Unconsciously he looked down upon the mass. He had no sympathy for the human misery he so graphically described, no sense that one form of the 'progress' to which he continually refers might be the satisfaction and sense of emancipation that come to a community when its members know that the organs of political power are within their control.

It may be argued in Maine's defence that he defined progress as the continual production of new ideas, and that this has no relation to the feelings of the common man. But even so, Maine never stopped to inquire what legal and political conditions are favourable to that particular aspect of progress. It never occurred to him that the 'continuous stream of new ideas' might flow more readily in a

society where the general mass of the people live under decent conditions and have some share in the government than in a poverty-stricken autocracy where they are scarcely more than serfs.

Even if we assume that Maine was right in asserting that the greater part of mankind detests change, it does not necessarily follow that democracy, which tends to produce continual change, is therefore bad. On the contrary, it might be desirable for the very reason that it counteracts the immobile disposition of the human race on which Maine laid so much emphasis. In some parts of his later work Maine displayed a sort of resentment that the world, which he had persistently announced as inherently opposed to change, was nevertheless changing continuously and rapidly before his eyes. The elaborate explanation that this disconcerting phenomenon was only due to the acceptance by the populace of the erroneous ideas of Rousseau and Bentham was scarcely satisfying even to himself.

A great part of Maine's belief in the immense conservatism of mankind arose from the fact that in the social and legal institutions of his time he discovered innumerable relics which had survived from stages of society that he believed to be of great antiquity. But the conception of antiquity current in Maine's day was far more limited than our own. The result was that stages of society which he believed to constitute almost the dawn of history were in fact quite late epochs of development. If Maine had known what is now common knowledge concerning prehistoric times, he might have been more impressed with the vast strides forward which have been made than with the disposition of human beings to conserve the past.

It is difficult not to feel that the conclusions which emerge from *Popular Government* depend essentially on the particular facts relating to the political character and social history of the human race upon which emphasis is laid in its pages; and that the emphasis was inspired by the inherent preferences of the author. The work, in short, is not objective. Maine was conservative by disposition;

therefore he disbelieved in political change. He was an aristocrat by nature if not by birth; therefore he disbelieved in democracy. He was an historian; therefore he disbelieved in natural rights. Hence he selected and stressed all those aspects of human history which seemed to demonstrate convincingly that change is opposed to human nature, that democracy must be unsuccessful, that talk about natural rights is nonsense.

VII

Maine may have been conservative in his political opinions. He was certainly not a reactionary in any sense of the word. His belief in practical improvement and social progress is shown by the strong interest he took in the reform of the law, both in India and in England. The system of public transfer of land, adopted by the whole civilized world except England and the countries under her influence, he regarded as the greatest legal discovery of the century. It provides, he pointed out, almost every end which the reformer has in view—security of title, cheapness, a clear understanding of rights.[1] He was a strong supporter of a codification of law in India. 'I look with dismay,' he wrote, 'on the indefinite postponement of a codified law of tort for India.' If the matter were left to be settled by judicial precedent, it would in fact be determined by a form of legislation, but it would turn out to be 'legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization'.[2] He did not hesitate to condemn the lack of precise language and clear thinking which had led the bench and bar of his day to take refuge in prolixity. He denounced in unmeasured terms the 'frightful accumulation of case-law which conveys to English jurisprudence a menace of revolution far

[1] Minute to Indian Government 1879. Grant Duff, p. 52.
[2] Ibid., p. 51.

more serious than any popular murmurs'.[1] He accused the system of English equity of having become as rigid, as unexpansive, as morally obsolete as were the sternest rules of the common law when the Chancellor first interfered with their operation.

But it is neither as a practical administrator nor as a law reformer that Maine's fame has endured and will endure. Whatever the character of his political opinions or social views he was, as a teacher and writer, the most open-minded and progressive force of his day. He entered, unassisted and unheralded, an intellectual domain which no English jurist had occupied before and into which none has ventured since.

From the eminent peak from which he surveyed the world Maine took—like the greatest teachers of the Middle Ages and the ancient world—all knowledge for his province. The history of ideas, the development of social institutions, the science of language and literature, anthropology, economics, political science: these and many other strands were woven into the thread of historical and comparative jurisprudence which he presented with unrivalled brilliance. He was, it is clear, a pioneer of method rather than the exponent of a system. But nevertheless, as Sir Frederick Pollock has remarked, Maine did nothing less than to create the natural history of law.[2] Even on the Continent, where the cultural aspects of law are studied with far more understanding and interest than in England, there are scarcely any works, save a few obvious landmarks such as *La Cité Antique* of Fustel de Coulanges, which can be compared in their own field with Maine's treatises.

Maine was, indeed, not only original, he was unique. That fact is to our grave discredit as lawyers. He blazed a great trail and opened up the heavens. He broke up the existing categories of thought and formed new and fruitful patterns of knowledge.

But who, one may ask, has followed him? With the one

[1] *Roman Law and Legal Education*, p. 10.

[2] Introduction to *Ancient Law*, 1930 ed., p. xvi.

great exception of Vinogradoff, we lawyers have remained cloistered in our narrow walls, treading complacently the old paths. In so far as the call has been heard at all it has been answered by the anthropologists and the historians. Sir James Frazer, the late Jane Harrison, Gustave Glotz, and Professor Malinowski are nearer to Maine in the spirit of their work than those of us who follow in the direct line of descent.

Despite all our neglect the call remains insistent. The vast and exciting discoveries which have been made in our own day in the fields of archaeology and ethnology, the unveiling of whole civilizations hitherto buried in the earth, the steady accumulation of new historical knowledge, the indication on every side of the organic relation between law and legal institutions on the one hand, and economic arrangements, political ideas, and psychological forces on the other: all demand that we should regard Maine not as an eccentric genius to be celebrated and then forgotten, but as an inspiring example to be followed within the limit of our capacities and opportunities.

AUSTIN TO-DAY: OR 'THE PROVINCE OF JURISPRUDENCE' RE-EXAMINED

By C. A. W. MANNING

YESTERDAY[1] at University College the centenary was celebrated of the death of Jeremy Bentham, one of the most influential thinkers of his own or any other epoch. One of the subjects about which he used to think was law: so much so that, had he figured among the galaxy of luminaries to whose contemplation this course of lectures has been given, no one could well have been surprised. His omission, however, will have been to some extent made good by the inclusion of a lecture on John Austin, who, in the particular field with which we here are concerned, had the principal part in overhauling, elaborating, and handing on to posterity a theory propounded, almost as *obiter dictum*, in the course of Bentham's massive examination of even wider themes.

It seems, moreover, in accordance with the fitness of things that, after ranging far and wide among thought-systems of foreign *provenance*, our attention should return in this concluding lecture to dwell upon the work of one who was himself a teacher in what was prospectively this University of London. Austin was Professor of Jurisprudence at the then newly founded University College—but not for very long. His teaching extended over only four years; and there is a certain pathetic timeliness in our pausing to re-examine it just now, for it was in this present month one hundred years ago that Austin regretfully gave up the attempt to justify his subject in the eyes of his audience.

In the autumn of 1832, after resigning his chair, he published *The Province of Jurisprudence Determined*, comprising some of the earlier lectures of his course. Though he lived another twenty-seven years, it was really not until after his death that, through the posthumous publication

[1] June 6, 1932.

of his unrevised lecture-notes and, through the eloquent praises of Sir Henry Maine, he came for a while to count among the very foremost of English writers upon law. Then, gradually, criticism of Austin in its turn became the fashion. Bryce, Sidgwick, Maitland, and their plagiarists built up the case against him, so that it is probably about as true to-day as when Bryce said it that 'most recent authorities are now agreed that his contributions to juristic science are really so scanty and so much entangled with error that his book ought no longer to find a place among those prescribed for students'.[1] For examples of the vein in which it now seems customary to mention Austin you should consult Professor Hearnshaw's recently published lecture, or the passage in which Professor C. K. Allen sums up 'this earnest, this all too earnest seeker after truth'.[2]

When appointed the first Professor of Jurisprudence in London, Austin was neither a Reader, a Lecturer, nor an Assistant Lecturer. Nor was he even a graduate. He had never been an undergraduate. His commission in the army had been obtained 'at a very early age', by purchase: not, that is, through Sandhurst or Woolwich. By any ordinary academic standards we may consider him to have been almost wholly self-taught.

The solid literature on his subject was practically all of it in German, a language which he did not happen to know. He was incidentally an invalid and not very well fitted by temperament to become a public lecturer.

On the other hand, to offset these minor handicaps, he was possessed with a profound sense of the importance of his mission, and the magnitude of the opening it offered. He evidently believed, with Hobbes, that 'the skill of making and maintaining Commonwealths consisteth . . . not (as tennis play) on practice only',[3] and, with Bentham, that 'the science of law considered in respect of its form is . . . to the art of legislation, what the science of anatomy is to the art of medicine'. . . . 'Nor is the body politic less in danger from

[1] *Studies in History and Jurisprudence*, ii, p. 182.
[2] *Legal Duties*, p. 144.
[3] *Leviathan*, chapter xx.

a want of acquaintance with the one science than the body natural from ignorance in the other.' So he set to work with the ardour that will triumph over every obstacle.

Being given two years' grace, off he went to Germany; and, from the condition of his books, now in the Inner Temple Library, one can appreciate how, in his German studies, he supposed himself to be laying the foundations of a life's work. Whether he fully understood all that he read is another matter. It is possible perhaps that, had he been less deeply imbued with certain of the ideas of Hobbes and Bentham, he might have made yet more than he did of the jurists of Germany and Rome. Let me, however, say in passing that I find merely jocular the suggestion, sometimes put forward by grown-up folk, that Austin had learned his jurisprudence in the army. This is but one among many little sallies that some friend of University College may by and by collect into a special 'Austin' museum.

In *The Province of Jurisprudence* there is, I think, relatively little to represent what Austin learned in Germany. His studies there were rather directed towards his main task as Professor of Jurisprudence: and remember that in *The Province* Austin gives us nothing beyond an introductory delimitation of the field within which his substantive teaching was to lie. It has lately been said that Austin nowhere explained what he meant by jurisprudence. This, however, he had sought to make clear in his first lecture of all[1] (a lecture not originally published with the others). In particular he had stated that jurisprudence had to do with what he called 'positive law': the succeeding lectures, which ultimately became the book, being an indication of what he would mean by that. Based fairly closely on Bentham, this account of the nature of 'positive' law, so far from being the final fruit of Austin's labours as a jurist, was hardly more than the jumping-off point from which he started. It was not for this that he had gone abroad and learned a foreign language.

I would have some excuse if, even in praise of Austin,

[1] *A.J.* ii, p. 1071.

I failed to-day to say anything particularly novel. The merits of his teaching, of which I had intended to speak, were eloquently advertised in 1863 by John Stuart Mill, who himself had frequented and diligently recorded the lectures. Then again, at a certain stage my idea had been to demonstrate the comparative ill-success of Maine's attempted summary of Austin's position (for it is one thing to sense the virtuosity of an argument, and a different thing to reproduce it faithfully). But I found that this point had been made at the beginning of an article by John Dewey in 1894;[1] and, though dissenting from much of what follows in that article, I do agree with those opening sentences. Although, therefore, his admiration for Austin is, I consider, one of his best titles to our esteem, I ask you not to depend upon Maine's version of Austin's view. 'No such conception of sovereignty as consisting in absolute force', says Dewey, 'is to be found anywhere in Austin.'[2]

You will do well to treat with equal caution the following sentences by Sir William Markby.

'The aggregate of powers which is possessed by the rulers of a political society is called sovereignty. The single ruler, where there is one, is called the sovereign; the body of rulers, where there are several, is called the sovereign body, or the government, or the supreme government. The rest of the members of a political society, in contradistinction to the rulers of it, are called subjects. . . . This is the conception of law as stated by Austin in his lectures on the "Province of Jurisprudence"; I have only repeated his conclusions.'[3]

[1] *Political Science Quarterly*, ix, p. 31.

[2] It was Maitland who, writing privately to Sir Frederick Pollock, said of Maine: 'I always talk of him with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked back at a book that he had once read . . .' *Letters of Maitland to Pollock*: letter dated 21.1.1901. Maine's words were: 'There is, in every independent political community—that is, in every political community not in the habit of obedience to a superior above itself—some single person or some combination of persons which has the power of compelling the other members of the community to do exactly as it pleases': *Early History of Institutions*, p. 349.

[3] *Elements of Law*, 6th ed., pp. 3–4.

One would walk far, were Austin alive to-day, to hear him reply to his critics: but one would also go some distance to hear him acknowledge the flowers of his friends.

The Province, then, is a statement of what Austin understood by positive law.

You will doubtless have noticed that the thinkers lectured about in this course on 'Modern Theories of Law', like those who have done the lecturing, have not all of them been primarily lawyers: and you will possibly have seen some advantages in this. Why are lawyers often so ill at ease in the definitions they give us of law? Why, for instance, do they so commonly offer second-hand answers? You may of course tell me it is the instinct of every lawyer to give second-hand answers, to rely, that is, on authority. But in this matter I suggest there is the further circumstance that the question is one for the solving of which a lawyer's experience is not in itself a peculiarly suitable training.

'What is philosophy?' is doubtless a philosophical question: for amongst other things philosophy concerns itself with the true meaning of terms. Legal questions also are often concerned with the meaning of terms. Yet 'What is Law?' is not a legal question. For this question is concerned with the true meaning of the term law: whereas law, if often having to do with the meaning of terms, is concerned not with their true meaning but with their legal meaning.

In a film recently shown, men from opposing armies met and exchanged notes half-way between the trenches. The defining of law is one of those topics on which the lawyers and political scientists might at least in peace-time usefully meet and exchange notes. As it is, there are—in the books of political science—things relating to law which few mere lawyers can understand, let alone endorse. And conversely I appreciate well that any one who, being merely a kind of lawyer, crawls out a little into No-man's Land, must expect what he comes in for from the big guns across the way.

Whether we call him a lawyer or not Austin's political theory was either definitely second-hand or at most merely

a variant on certain ideas familiar in Benthamite circles. That law must be sharply distinguished from morals; that law was an aggregation of laws; that a law was a command, its badge as such being a sanction; that the maintenance of a system of law presupposed what McIver calls the Will *for* the State, and Bentham had called a general habit of obedience: his originality lay, not in entertaining these ideas, but in the laborious thoroughness with which he restated them.

If, however, he retained with little alteration Bentham's notion of law, he was not equally receptive of the great man's conception of jurisprudence,[1] or even of the somewhat different definition given by the elder Mill, Governor though the latter might be of the College where Austin was to teach. The new professor seems to have permitted himself an independent judgement as to the scope and purpose of his own particular subject. If in this respect he was a borrower from anybody, I fancy it was from Professor Falck of Kiel (even more than from Professor Hugo, to whom Austin expressly refers).

The purpose of jurisprudence, he allows himself thus more or less arbitrarily to assume, is instruction—in particular, to beginners in the law. Accordingly he will examine—as being 'pre-eminently pregnant with instruction'—[2] certain aspects of the ampler and maturer systems of law which obtain in societies of a certain type. He will study 'the general principles, notions, and distinctions' common to such systems. He makes no thorough-going attempt to define law in its most general sense. Noting, however, that the systems with which he proposes to deal have a certain common characteristic, in virtue of which he calls them systems of 'positive' law, he does seek to explain what he means by this particular term.

Humpty Dumpty, you will remember, reserved his liberty to give words whatever meanings he chose. Austin,

[1] Austin underlines in Bentham, but certainly does not adopt, an allusion 'to that branch of jurisprudence which contains the art or science of legislation'.

[2] *A.J.* ii, p. 1073.

when explaining his own ideas, assumed a similar freedom: but, as the teacher of young law-students his concern was usually to render explicit the particular meaning that words bore in the standardized and ordinary usage of lawyers. As Professor Ginsberg told us, 'You can define law in such a way as not to bring in the notion of "State" at all.' Austin would, I think, have asked himself, 'But will that represent what the lawyers are thinking about?' This as to his attitude in dealing with terms.

An important clue to another of Austin's main preoccupations is to be found, I think, in the good words he has for a certain Dr. Brown, a psychologist, who, in his discussion of the springs of human behaviour, seems to have concluded that every act of a man was simply the automatic resultant of the balancing-up of a number of competing desires. In dealing with facts—and human activity is a fact—it is evidently Austin's opinion that the investigation should proceed in a spirit of relentless realism regardless of the promptings of traditional terminology. In those days it seems, as in these, to have been widely, though not universally, believed that man was endowed with a will. 'That this same "will" is just nothing at all', says Austin, 'has been proved (in my opinion) beyond controversy by the late Dr. Brown: who has also expelled from the region of entities, those fancied beings called "powers" of which this imaginary "will" is one .... For further proof I must refer you to Brown's *Analysis of Cause and Effect*.'[1]

It would hardly be possible to discuss Austin succintly without paraphrasing his position. This is admittedly a difficult task, calling not only for a sense of the exact intention of the writer's language, but also for a certain sympathy with the feelings that led him to say what he did. What follows here is an attempt to convey, mostly in *non*-Austinian language, what seems to me the substance of Austin's view.

With what did he begin? With his notion of man? Of

[1] *A.J.* i, p. 412.

society? Of political society? Of sovereignty? Of law? Of positive law? Though expert opinion appears divided even here, the new professor of jurisprudence seems, on his own showing, to have begun, relevantly enough, with his notion of jurisprudence.

Jurisprudence had to do with systems of positive law. Such systems obtained in what he would term 'political societies'. Such societies were composed of individuals—and it was ultimately on the psychology of individuals that the systems in question rested.

At the time Austin lectured the English governmental régime was an example neither of absolute monarchy nor of anything like universal suffrage. The first Reform Bill was as yet only under discussion. His personal interest in the comparative study of forms of government was, for the purpose of his introductory lectures to law-students, limited by the recognition that, for that purpose, structural diversities of governmental mechanism were not immediately material. His view was not, I think, that absolute monarchy was the normal, or the ideal, or even a desirable basis of government, but that it was the simplest to express in a diagram and that, in relation to the individual confronted in a particular situation with a particular legal prohibition or injunction, it could make little if any essential difference whether the system was one of absolute monarchy, of universal suffrage, or of something midway between. The possibility of government as such did indeed depend upon the maintenance of a ratio, but the ratio in question was not one between those who did and those who did not participate in the function of governing, but between those who did and those who did not acquiesce in the system as such.

As for law in general, it is, as I have said, worth noticing that Austin discussed it not as a phenomenon occurring in various forms, but as a term endowed, properly or improperly, with various meanings. The item 'positive law', however, would by him be used to denote a certain important feature incidental to the life-process of a functioning

'political society'. Positive law presupposed government, however rudimentary. Government rested upon an attitude prevalent among members of the society. Given the appropriate attitude and given the consequently feasible law, it implied for the individual the possibility of coming in the concrete vicissitudes of his daily life against what we may term particular legal requirements. The system of government, no matter what its form, would furnish on the one hand the content of the law's requirements—a content which might be repugnant to him: on the other hand, it would also furnish a possibility or probability of disagreeable consequence in the event of his non-compliance with those, the law's requirements.

On the one hand, then, you had the average individual, and hence society in general, preserving a certain prerequisite attitude. On the other hand, the exceptional individual for whom, with his lack of any general predisposition to obey, the law's requirements would in certain cases represent nothing more than a crude choice between two alternative evils.[1] For while, without a widespread habit of obedience, the governmental system could not function, the characteristic mark of positive law as such was that the exceptional individual, if he disregarded the law, ran thereby a certain specific kind of risk. Political societies no doubt took various forms: but, the dependence of government on the attitude of the average individual, and the predicament of the exceptional individual faced with his choice of evils, were constant factors no matter what the form.

With absolute monarchy the content of positive law was determined by the monarch, and the average individual's acquiescence in relation to the law was simply an aspect of his general habit of obedience *vis-à-vis* the monarch. The entire system, however, rested at bottom on this attitude of the mass. The authority of the monarch was merely the correlate, the reflex, the counterpart of their habitually obedient attitude.

[1] *A.J.* i, p. 454.

The evil consequence held out as liable to be visited upon the offending individual Austin called a 'sanction'. In that the desire of avoiding the sanction was among the factors contributing to determine the individual's actual behaviour, the law was said to be 'binding' upon him, to 'oblige' him, 'obligation' being thus definable as a contingent evil. The fact that positive law depended for its distinctive character upon there being associated with it a sanction might be expressed by calling positive law 'imperative' and putting it into the general category of 'command'.

The command of the monarch, then, binds even the exceptional individual. But we are never to forget that this is so only because behind the command, the positive law, is the monarch's authority, the correlate, the reflex, the counterpart of a prerequisite habitual obedience. Nor is it our business in a generalized analysis to account for this acquiescence. It is enough to say that without it the system would not be possible.

Now what if the political society take some other form? How can it be said that this will make no substantial difference to our analysis of the relation between positive law and individual psychology? Remove the absolute monarch. What then? The reason why government is still possible is because, in place of the absolute monarch, and filling the same role, we find in other systems what may be thought of as a substitute mechanism, less easy to suggest in a diagram, but, like an absolute monarch, furnishing the law's content and enjoying the needful authority.

And this, I imagine Austin saying, is what we find Where you have no absolute monarch, you have a 'constitution' which distributes among a smaller or larger portion of the community the possibility of joining in a process the resultant of which is treated precisely as if it were the fiat of an absolute monarch. So that we may say that, where you have not an absolute monarch, you have a determinate number which, by acting in its collective capacity,

fills the same role as elsewhere an absolute monarch might fill—and this because it enjoys the same authority.

It matters not that we call such authority. But let us call it 'sovereignty'. We may now say that positive law is an aggregation of commands of the sovereign one or number.

Theoretically, constitutions may be thought of as either susceptible or not susceptible of amendment. Austin's thesis is that, given a constitution admitting of amendment, the number who participate, or who could at pleasure participate, in the amending process collectively hold that authority which corresponds to all such habitual obedience as would continue to be rendered under the amended constitution.

The assumption you see is that obedience to any given régime may properly be construed as obedience to that authority at whose pleasure such régime persists. In a particular case it is possible that we may mistakenly descry the authority in question; but then it is not the generalized theory which will be at fault, but our application of it in misconstruing a given set of facts. Maybe a given society is not a political society within our definition at all. Maybe the authority though determinate is determined by technical formulae which deceive us.

The real question is, 'With what sort of validity can you be said to obey me when you are merely obeying those whom I have commanded you to obey?' A system in which human wills are constantly active, but under which only those get their way who observe forms prescribed by an authority seldom active, is one in which it is only in a certain sense true that that authority is all the time getting his way.

No one, I hope, will feel insulted if for the sake of emphasis, I make use now of some familiar analogies.

You will not, I trust, fall into the error of supposing that in Austin's mind the sovereign number and the subjects were mutually exclusive groups. Though this School can

for some purposes be conveniently thought of as made up of teachers and students, it is to be hoped that no one here is a teacher who is not a student also, and I imagine there are few titular students who do not now and then take a hand in the teaching. That, after all, is what students are for. Even if the sovereign number embrace the whole community the distinction between the sovereign and the subjects remains intact and helpful. Can we not, in the case of a company, differentiate between the directors and the shareholders, although the directors themselves hold shares? Do we not, with similar reservations, talk of producers and consumers, or, at a wedding, of friends-of-the-bride and friends-of-the-bridegroom?

Then, as to the celebrated objections about the régime of Runjeet Singh and about the Laws of the Medes and Persians, one can only point out that what Austin gives us is *his* conception of a 'political society'. In examining our notion of, say, a modern city, we do not proceed: 'Venice exists to-day: therefore Venice is a modern city: there are no taxis in Venice: therefore there are no taxis in a modern city.' We say rather: 'Although Venice exists to-day it does not represent *our* notion of a modern city.' It is no doubt psychologically possible for a community to commit suicide before the altar of its deceased ancestors, in obedience to a law which they said should be changeless. You will remember Casabianca 'staying put' upon the burning deck. So too, a nation's foreign policy . . . . However, that is another story. But one may conjecture that Austin would have brushed aside such an example as illustrating merely an abnormal, pathological condition of political mentality. In a normal community, he might have said, the law is made for society, and not vice versa: and it is amenable to change, the only important question being, Who is to have the last word in the matter of whether and how?

Moreover, although it may look like one, this is not at bottom a legal question. Nowhere that I have noticed does Austin define sovereignty as the supreme legal competence

to legislate. His paraphrasers, I think, with hardly an exception ascribe to him such a definition. He does not trouble to define *legal* sovereignty—though he evidently understands as well as any one the constitutional position of Parliament in England. He does indicate pretty clearly what he means by sovereignty. It is the authority logically correlative to the prevalent attitude in a certain type of society. And this authority is logically *pre*-legal, as indeed almost everything, in his system, may be considered pre-legal, except the content of this or that separate command.

It is too commonly supposed that for Austin legislation was the typical law. All I understand him as saying is that only where legislation occurs have you a society whose legal system can be described as, for English law-students, 'pre-eminently pregnant with instruction'. In his theory, as I understand it, nobody *commands* except the sovereign: command is logically pre-legal: on the other hand *legislative power* exists under and by virtue of the law of a constitution—as does the power of the citizen to vote. For Austin, as it seems to me, legislation is no more essentially a command than contract is. Each is the exercise of a power, under the existing law, to modify the existing legal position. Kelsen, with his 'gradual concretization and crystallization of the legal order', is merely using other words for Austin's vision of all legal rules as deriving their specific force from the same ultimate fountain of authority.

What interests Austin, and at bottom matters most of all, is, not where the constitution declares that the highest constitutional authority shall under the constitution reside, but whence the constitution itself derives that logically pre-constitutional authority in virtue of which it at all substantially matters *what* the constitution has to say. Generalized, Austin's position is, not that the sovereign is a specified organ or complex of organs, but that it is that individual or collectivity at whose pleasure the constitution is changed or subsists intact. 'Unless we watch developments closely', writes Mr. Jennings, 'we shall find the Cabinet becoming a Grand Fascist Council and the

Prime Minister a Dictator.' 'Wisely spoken;' Austin would say, 'it is precisely the business of the sovereign number to watch developments closely. . . . Every sovereign gets the constitution it deserves.'

His logic then is—The people inherits, tolerates, and so maintains a constitution. The constitution (*a*) fixes the membership of the sovereign number or the identity of the sovereign, and (*b*) organizes governmental machinery under that sovereign. At any moment the people may overthrow the constitution, and *a fortiori* the sovereign, and *a fortissimo* the government. At any moment the sovereign, while maintaining the constitution, may overthrow the government. The government will do well, therefore, to give heed to the attitude (*a*) of the sovereign; (*b*) of the people. Where—with a broad suffrage—the sovereign and the people tend to be identical the government need think of only one body of opinion at a time. *Tant mieux*—or, if you like, *tant pis!*

You see, the point Austin is making is not so much that law depends on the ideas of the electorate as to what ought to be law, as that the system depends upon the ideas of the community as to who ought to form the electorate. The law designates, but cannot change, the electorate. The electorate, on the other hand, theoretically at any rate, can ultimately change the law. So, of these two, the electorate for the time being seems to be—what shall I say—'top-dog'. But the electorate is top-dog only so long as the community habitually obeys: so the community is top-dog. Even if the electorate be so extended as to include the whole community it may in one capacity become very tired of what it does in its other capacity—just as you may cook your own breakfast and none the less dislike it.

So much for the law's relation to the habitually obedient mass. Let us now talk of sanctions, and the law's relation to the potentially disobedient individual.

In order to be influential sanctions do not of course need to be constantly in visible operation. 'If', says Austin, 'the obedience to the law were absolutely perfect, it is manifest

that sanctions would be dormant . . . We undoubtedly can conceive a state of society so improved and refined that obedience to the law would be perfect.' Perhaps! However, of more importance is the question, Why, in point of fact *do* the people obey? Notice that Austin is far from assuming that the bulk of the community render their habitual obedience through fear of sanctions. 'The man who fulfils his duty', says Austin, 'because he fears the sanction, is an unjust man, although his conduct be just.'[1]

Austin's position is that the individual is under what is nowadays termed social control—which in the marginal case occurs as institutionalized coercion. In a school of economics we are bound to be familiar with marginal cases. Austin's account of the function of the sanction suggests to one's mind the picture of a sheep-dog. The business of the sheep-dog is to round up the marginal cases. If all the sheep wanted to be marginal cases there would not be much of a flock. The flock owes its continued existence as such not merely to the sheep-dog, but to the fact that the average sheep is content to trot along in the middle, and rarely if ever becomes a marginal case.

Furthermore, even as regards those who in complying with the law advert consciously to the sanction, Austin does not contend that the fear of a contingent evil is the sole, or even the principal, factor operative in determining their obedience.

'In case the party', he says, 'at the moment of the alleged wrong were conscious of the law and could foresee the consequences of his conduct, it is manifest that the sanction would inspire him with some desire of avoiding it. And an inquiry into the strength or steadiness of that desire, would seem to be idle; because it must necessarily be different in every different person, whether he be infant or adult, mad or sane, drunk or sober.'

Whether this be sound psychology or not, Austin clearly is anxious not to exaggerate the actual influence of the

[1] *A.J.* i, p. 449.

sanction. When we say of a meeting that the more advanced people came in red ties we mean that they wore the badge of a certain political tendency: we single out for mention a small but significant detail in their dress; but we do not mean that they came in ties and nothing further. The sanction is the badge of the legal rule, but this does not mean that fear is the only motive making for compliance. Even the marginally-minded sheep will take a turn at mingling with the flock, and this not necessarily for fear of the sheep-dog.

And what if for one reason or another the sanction cannot be applied, the machinery of enforcement cannot be set in motion? See how carefully Austin avoids the thesis that law is law by virtue of its enforcement. Whether the particular rule could in every case be effectively enforced did not concern him. The law is a declared wish, the disregard of which is *in principle* liable to be visited with sanctions. Anyhow, it is the connotation of the term he is giving, not the course of events as observed in practice.

May I ask you to think of the wash-basin in a hotel bedroom? Why is one of the water-tops marked HOT? You know by experience that even from a hot-water tap it is not always possible to obtain hot water. You know that the hot-water tap is properly so called because if at a given moment you turn it on there is a *chance* that the water will be hot. So too, Austin makes it abundantly clear that law for him is law because there is a chance that the breach of it will be visited with an evil.[1]

Even for one who appears, like Austin, to conceive of 'the sovereign' as the ultimate recipient of the people's obedience, and to assume that sovereignty as so understood must reside somewhere, there would seem to be room to disagree with his reading of the facts, say, in parliamentary England. Dr. A. D. Lindsay for instance, I rather think, considers that obedience in a modern state is ultimately rendered neither to one nor to a number but to the constitution

[1] *A.J.* i, p. 90.

as such.[1] Deference to the Powers that Be thus comes in merely as a corollary to loyalty to the Constitution that Is. To this a would-be defender of Austin may perhaps protest that the constitution in its turn only enjoys support because conceived of, however vaguely, as in principle allowing the law to give expression to the wishes of the electorate. Is it easy to say which picture is the truer to life? Assuming that sovereignty must lie somewhere, are we to conclude that it is, so to say, a wise community that knows its own sovereign?

You will probably agree that, if Austin's 'placing' of sovereignty is to be judged purely as an attempted rationalization of the average citizen's submission to the law, Dr. Lindsay's opinion seems at least equally near to the truth. But I doubt if Austin would have admitted that his problem was merely to formulate accurately the tacit assumptions of 'the law-abiding citizen'. The question he was considering was, I think, both more simple and more subtle. More subtle, for reasons which will, I hope, appear as we proceed. More simple, because to psycho-analyse an abstraction seems to me a palpable impossibility, and for living individuals there are between the two extremes many possible intermediate positions. Some of those who habitually obey the law may do so with no more than the vaguest idea that somebody (one word), or some body (two words), is by the constitution entrusted with the last word, if not in so many words. In order for ideas to determine human conduct it is not necessary that they be clear—any more than that they be true.

In so far as a functioning legal system rests at bottom upon prevalent assumptions it is, no doubt, upon the assumptions of laymen, and not for instance the assumptions of lawyers—and this despite the fact that law in itself is a body of doctrine orthodox among a professional lawyer

[1] *Aristotelian Society's Proceedings*, 1923–4, p. 244. The people's obedience to 'certain persons' is 'derived from its obedience to the constitution', the 'main fact about all modern constitutional governments' being that 'the bulk of the society' accept the constitution.

class. But the communal psychology upon which government is founded cannot, I think, be exhaustively portrayed in terms of coherent assumptions at all. And such common ideas as do seem indispensable—for example the belief that law as such is binding—do not cover all the questions Austin would have liked to answer—as, for example, the question, Why is it binding, anyway?

In passing I think we might also notice that, on Dr. Lindsay's very attractive reading of the facts, the modern state is anyhow not a 'political society' within Austin's definition at all, so that, at least on the logically pre-constitutional plane, there is no necessity to seek in it for authority, or for obedience either: the field thus lying entirely open for some quite independent theory, in terms, say, of a general sense of the prospective blessings of co-operation. And, although while rejecting Austin we are free to use words as we will, it would be convenient if, on the pre-constitutional plane, we could in such case altogether avoid the term sovereignty, so deeply is it tinged for many of us with authoritarian associations.

Not all of Austin's other critics seem to me to have studied him with such care as Dr. Lindsay. You will remember Professor Goodhart's words: 'So far as I know, no American lawyer has ever accepted Austin's attempt to place sovereignty with that body which has power to amend the constitution.' In certain of those cases I fancy you would find that the objector had tested Austin's results in the light of some conception of sovereignty different from that which Austin is purporting to apply. There is indeed a quite common tendency to talk at large of 'sovereignty' and 'the theory of sovereignty' in loose association with the name of Austin; whereas the term is used in many senses and enters into the statement of many theories—while Austin was responsible only for a particular account of the relation between law and communal psychology, in the course of which he made use of the term 'sovereignty' in a single rather clearly defined sense.

Nor is he one of those writers who, starting with a word,

'sovereignty', ask themselves, What shall I mean by it? Where shall I place it? He starts with an assumption of fact—the existence, or assumed existence, in the world, of some political societies, as defined by him, and asks, What is the essence of such an assumed situation of fact? At the root of much misunderstanding there is, I suspect, the idea that for Austin the typical law was a British statute, that to 'command' meant to 'enact', and perhaps also that just as we are apt to talk of Members of Parliament as so many 'legislators', so Austin thought of the sovereign number as so many 'commanders'. What in Austin's theory the anti-social individual fears to-day is the sanction attaching to-day, and only by virtue of that sanction does Austin consider any law to be in force to-day. We, however, are wont to regard say, the Statute of Frauds, as in force because of its having been enacted, i.e. commanded, once and for all, by Parliament, in 1677.

First, let us notice that Austin never conceives of action by the sovereign number in their several capacities. The number is always referred to as It, not as They. He nowhere suggests that the sovereignty is shared among the sovereign number.

Again, although positive law for him is an aggregate of laws, each law being a command, that is to say being supported by a sanction, he says nothing which is inconsistent with the picture of a sanctioned *system*, every component element of which is sanctioned by its mere inclusion in the system. The several provisions of yesterday's statute are law to-day, because part of a system of law which is sanctioned to-day and therefore commanded to-day. As an engine by putting current through an electric system keeps each several lamp in a city continually alight, so the sovereign in effect displays constantly a signal 'As the law stands to-day, so let it continue to stand'. As the lighting system lives by reason of the power-station in the background, so the system of law is kept in operation by the always imperative aspect of the sovereign in the background. The Statute of Frauds has its place in the system

because enacted by Parliament in 1677, but it is binding because commanded by the sovereign number here and now.

Returning to the topic of action taken by 'It', the sovereign number, you will not, I hope, protest that this is an extravagant and ill-explained idea. So far from explaining it now, I shall merely mention that in this matter Austin's language is perfectly consistent. The sovereign number only acts 'in its collective and sovereign capacity'. For, whether the idea be intelligible or not, it is plain that lawyers, like laymen, both civilized and savage, take kindly enough to the notion of action by a number in a corporate capacity. After all there is at bottom no difference between 'consulting the electorate' and 'putting a resolution to a committee'. No one who swallows the theory that a committee 'takes decisions' should strain at the doctrine that the King, Lords, and electors, acting in their corporate capacity (that is through the recognized forms) causes or could at any moment cause the law to change.

That Austin had thought on these things would appear from his disapproving reference to a dictum of Julian. 'First,' he says, 'it confounds an act of the people in its collective and sovereign capacity with the acts of its members considered severally, and as subjects of the sovereign whole.'[1]

Having once noticed that Austin's sovereign number is to be thought of, not as a plurality, but as a personified collectivity, we perceive that his sovereign is after all an abstraction, and his sovereignty and command just a brace of ideas. This 'number' is not on any theory that Austin could consistently sustain a 'real' being. It—as distinct from its component elements—is just as much a 'fancied being' as any of those so-called 'powers' which his much-admired Dr. Brown had so impressively 'expelled from the region of entities'. Both the 'sovereign' and the 'command' are part of a theoretical apparatus quietly, and I suppose unconsciously, introduced to serve as a link between the habitual obedience of the many and the exercise by various hands of various kinds of legal competence.

[1] *A.J.* ii, p. 540.

The actual facts of government may be complicated and difficult to ascertain: but once we start personifying collectivities we have already left the realm of fact for the world of ideas, and in this world of ideas the question when a given collectivity is to be deemed to have exercised its collective will can scarcely be a mere question of fact. Where reality is intricate, it is the privilege of theory to be simple. If, owing to man's nature, government be possible only when it is by most people readily acquiesced in and for exceptional people potentially coercive, and if the acquiescence is towards and the enforcement is at the hands of one and the same 'system of government', the simplest plan for the theorist may be to have a single personified entity to fill both parts—to receive the obedience and to issue the commands. There are limits, of course, even for the theorist, but they are the limits not of what is true, but of what is plausible, and intellectually convenient. For instance, the sovereign collectivity has to be 'determinate'. Why? you may ask. Dr. Lindsay says, 'This is clearly for a lawyer essential'.[1] Austin gives a more generalized answer, the substance of which is that any collectivity (whether one that legislates or one that in practice merely confers legislative competence) must, if it is to function in accordance with constitutionally significant forms, have a membership constitutionally determinable.[2] And this 'must', you will realize, is not a mere lawyerly, constitutional 'must' but a common-sense, practical, extra-constitutional 'must'.

The sovereign collectivity is determinate in the sense that its membership may be ascertained by reference to constitutional law, which distributes the competence to participate in the process whose resultant will be deemed the expression of the sovereign's pleasure. A revision of constitutional law may to-morrow redistribute the right of participation, but if this be effected in due constitutional form, this redistribution will itself be taken to have

[1] *Aristotelian Society's Proceedings*, 1923–4, p. 238.
[2] *A.J.* i, p. 189.

happened at the pleasure of the sovereign collectivity, which will be deemed to survive intact the change in its membership just as if that change were occasioned by the death of an old voter or the qualifying of a new one. That abstraction the sovereign lives on with an undisturbed identity—in the world of ideas.

Some one may at this point propound a nice conundrum. How comes it that the so-called 'determinate sovereign number' is found, on inquiry, to be determined only by the criteria of that law which, by definition, is the output of the sovereign number itself? Can a logically pre-legal sovereignty be ascribed to a collectivity whose very membership is determined by law? Is there not a certain circularity here? This is the twin-brother of another question, which goes to the heart of the whole matter, namely, how, except *under* a constitution, can a sovereign, or any other, number act in its collective capacity? How in the first place did Austin's sovereign number proceed to establish those criteria, or delegate the power to establish those criteria, by which the membership and mode of functioning of the sovereign number itself were from then on to be determined? Granted that, the game having once begun, the resultants of certain constitutional processes *are*, by extra-constitutional doctrine, deemed to be commands of the sovereign, by what original process must the sovereign number be deemed to have in the first place determined what were thenceforth to be considered due constitutional processes?

We are here on the plane of pre-constitutional dogma, where it is very much a case of 'Every man to his fancy' It is the realm in which a Hobbes puts his savings on a Social Contract and a Kelsen, if I am not mistaken, on an Initial Hypothesis.

One answer Austin might offer would be that a purely analytical treatment need not profess to cover the problems of social prehistory. Even though we cannot tell which came first, contemporary observation of the egg and the chicken does nevertheless enable us to say positively

that, in current practice, each serves as a source of the other. Law having at a certain stage established orthodox criteria for determining the membership of the sovereign number and its modes of self-expression, social statics can only make grateful use of those criteria, not however merely because they happen to be legal, but because by the same token they happen to be orthodox.

The real explanation, as it seems to me, why Austin's placing of sovereignty 'under the English constitution' has been a puzzle to everybody since, so that hardly any one pauses to assume that he seriously meant it, is that, while, in finding the sovereign, both Austin and his critics rely on legal criteria, he and they do so for differing reasons. His critics rely on legal criteria because they start with a legal notion of sovereignty and are looking to see where the law puts legal sovereignty. Austin adopts legal criteria because present recognition of legal criteria seems to him to be implied in present submission to government. He is never looking for *legal* sovereignty. He starts with the *notion* of factual sovereignty—not as 'practical mastery' but as the logical correlate of an assumed factual obedience —and infers that such obedience allows sovereignty to reside wherever law places the ultimate control. He does, it is true, trace sovereignty rather like a real property lawyer tracing title: but he is not interested in the law's ideas on their own account; it is the logical implications of a law-abiding people's attitude that he is following out.

Without necessarily believing Austin to have vividly realized what it was he was attempting, I fancy some of you will now be with me in considering it to have been a more subtle task than the mere rationalizing of an habitual attitude; and, if it had not been obvious to you all along, I hope my use a little way back of the term 'social statics' may have helped to show you what I take to have been the nature of that task.

In case, however, some one may still be accusing me of

talking in riddles I propose to offer here a further word of explanation.

The metaphorical use of the term 'force' in the analysis of social situations is, I suppose, familiar enough. If then for a particular purpose we assume, as Austin does, a momentary condition of stable social equilibrium, it seems legitimate to style the study of that situation an exercise in social statics.[1]

The process of rationalizing a personal attitude, of attempting to make explicit what the point of view underlying it would be if consciously and candidly formulated, may perhaps be described as the process of construing that attitude intrinsically. To this process we may oppose that of construing the attitude in the light, not of its psychological basis, but of some outside criterion, adopted because germane to some particular purpose. This way of construing the attitude will be, not intrinsic, but extrinsic.

What Austin construes extrinsically is, not the particular situation existing, say, in the England of 1828, but the type of situation obtaining in 'political societies' as a class. The purpose in view is the intellectual fortification of young law-students. And the criterion relied on is the logic of a modern constitution.

Every objection to Austin's work as being an imperfect description thus seems to me beside the mark. To observe and describe is not the same thing as to observe and construe. Perhaps it is impossible to give a single description which covers the social statics of all societies at all times—or even all parts of a given society at a given time. On the other hand, for a given purpose, a given construction may be found to fit equally well (though for other purposes it fit equally ill) every society relevant to the given purpose.

Austin, in a word, was not describing a particular situation for the student of sociology or history. He was construing a type of situation for the student of law. Confronted with the antithesis between an attempt to describe

[1] The term I know occurs in Herbert Spencer, but I do not know whether it is in a similar sense.

what happens somewhere and an attempt to construe what happens more or less everywhere, I do not think he would have hesitated at all. Description was matter for local political history at best. Social statics could only construe.

Here is a recent pronouncement on the nature of obedience in a modern state:

'Obedience is now rendered not to a person but to the political community; and not because of command primarily but by reason of assumed consent. . . . Those who command do so not merely because of their office, or because of their personality, but because of the general recognition that they serve a useful function in the community—a function in terms of the general welfare as interpreted in the last analysis by the generality of the folk in the state.'[1]

Is that interpretation? Or is it generalized description? Or is it a half-conscious attempt to be both?

Austin's analysis seems to me to be purely an interpretation. Acceptance of any régime, he virtually tells us, can in principle be construed as submission to the collectivity in which the constitution vests the ultimate say; and implies an attitude towards all law laid down in a constitutionally operative manner which is the same in effect as if that law were an aggregation of commands emanating from that collectivity. In effect, what the constitutional system amounts to is an attribution of authority to a personified collectivity, the component members of which are themselves determined by the constitution.

Along with other writers, Austin fails in so far as he seemingly supposes himself to be merely observing and describing; but, considered as a piece of interpretation, adopted merely as a basis on which to teach elementary jurisprudence, his sketch of the relation between the communal psychology of habitual acquiescence and the individual psychology of occasionally reluctant obedience seems to me not without value—at any rate as a first approximation.

You will notice I am careful not to claim that he saw what he was after. Starting from the assumed fact of habitual

[1] Merriam, *The Making of Citizens*, p. 282.

submission he ignores the possibility of debate as to who, if anybody in particular, it is that receives it. He does not distinguish the questions—To whom in fact is obedience rendered? (Who ever knows?) and To whom in effect is it rendered? (to which we can more or less universally answer, To that one, or number, in whom the functioning constitution can be construed as vesting the ultimate control).

What Austin does is to marry these two questions and treat the result as if the husband and wife were one person. Our sense of realities, naturally enough, is shocked. 'Surely it strains language,' writes Sidgwick, 'to say that during these sixty years citizens of the U.S. "habitually obeyed" this inert composite entity.'[1] Austin might have retorted, 'It likewise strains language to say you've received a letter from your cousin in Australia, when the truth is that you received it from the postman.' But a better answer would have been, 'In stating what *in effect* happens how is it possible *not* to strain language? The more complicated the position the more "artificial" can any simple construction of it be made to seem.' Sidgwick himself does not object to language being strained provided it be not strained too much. '... the interference of Parliament by new statutes has long been so active in all departments of our law that we may without a very violent fiction regard it as approving of whatever it does not abrogate or modify, and as approving the action of the judges in occasionally modifying it.'[2] Those words 'very violent' are most significant. It appears after all to be merely a matter of differing degrees of violence. Every beginner knows how, although in point of content the bulk of the Roman praetor's edict was 'tralatician', taken over from his predecessor, yet in point of authority it operated under a given praetor as the edict of *that* praetor, as *that* year's edict, in fact. As Austin saw, authority, as opposed to content, was, for social statics, the only thing that mattered. And thus he speaks of a traditional body of law as *being* the command of the

[1] Sidgwick, *Elements of Politics*, 4th ed., p. 27. [2] Ibid., p. 652.

presently obeyed sovereign. 'Being, in effect', one would have preferred.

I do not know how seriously Sidgwick's treatment of Austin is nowadays taken, but it includes one or two further points upon which in passing I cannot forbear to touch.

Compare particularly with Austin's own words Sidgwick's quotation of his passage about the moral, though not legal, trusteeship of Parliament *vis-à-vis* the electorate. The whole passage hangs on a temporary concession which Austin explicitly makes to the popular notion that, in a sense—though, he considers, not at all in a strict sense—Parliament for the time being is possessed of the sovereignty. 'Much to our astonishment,' says Sidgwick, 'Austin calmly adds . . .' and scoffingly exposes the contradiction beween the two views—leaving out the opening words in which Austin expressly explains that one of them is not his view at all.[1]

Again, to show it is misleading to say that there is in Belgium a sovereign with power legally unlimited, Sidgwick points to the fact that a Belgian's right to worship or not . . . as he pleases . . . cannot legitimately be impaired by ordinary legislation.[2] Austin, in reply, would I believe have observed that only through the use of his phrases out of their context could he be represented as having made any attribution of sovereignty at all to the legislature as such. Lastly, as for the point, relied on by Sidgwick and others, that under a rigid constitution there are some things which can only be done cumbrously or slowly, the reasoning here strikes one as worthy of the proposition that, if a man stammers when he is nervous, he is by definition incapable of making an unconditional offer of marriage.

Other influential critics were Bryce[3] and Dicey.[4] The main force of the complaint lay, in each case, in the allegation that Austin had confused two 'kinds' of sovereignty, the political and the legal, or the legal and the practical.

[1] Sidgwick, *Elements of Politics*, 4th ed., p. 657. [2] Ibid., p. 655.
[3] *Studies in History and Jurisprudence*, ii, p. 62.
[4] *The Law of the Constitution*, 8th ed., pp. 78–80.

'Where,' proceeds Bryce, 'the Legal is not also the Practical Sovereign, it is obviously a far more difficult task to discover the latter than the former.' The truth is that Austin does not attempt either of these tasks. He concerns himself neither with 'Legal Supremacy' nor with 'Practical Mastery'. Law, for him, logically presupposes pre-legal supremacy and practically presupposes habitual obedience from the bulk. . . . He construes the law of the constitution to find the notional sovereign to whom by implication obedience is paid by those who unquestioningly submit to the system of government. What we may style 'Austinian' sovereignty is neither legal nor constitutional (for both the law and the constitution presuppose it), nor practical (for experience is concrete and particular, whereas he is generalizing and proceeding by deduction). His sovereign is not a sociological reality. It is a concept of abstract social statics.

Professor Hearnshaw is hardly less censorious, referring to 'this sharp and all-important distinction between legal and political sovereignty, which Austin so fatally ignored'.[1] He too assumes that Austin is, or rather that he ought (!) to be occupied, not in looking for the collectivity to which habitual obedience is rendered, but in an attempt to describe the body which enacts the law. '. . . it was essential,' he writes, 'for the completion of his system of thought . . . that he should consider and define sovereignty purely as a legal conception without reference to either politics or ethics. . . . If Austin had confined his attention to his proper task . . . viz., the definition and location of legal sovereignty, he might. . . .'[2] It is rather as if, at a cricket match, Professor Hearnshaw were to say, 'The only question a spectator is entitled to ask is, "Who is captain?" . . .'. Whereas Austin, a student of society, is saying to himself, 'These men in flannels have wills of their own. Why are they behaving like this?'

Yet another 'kind' of sovereignty is put before us in

[1] *Social and Political Ideas of the Age of Reaction and Reconstruction*, p. 186.

[2] Loc. cit., p. 182.

two most able and interesting articles by Professor John Dickinson. 'I hope,' he says, 'it will be noted that I do not rest the case for "juristic sovereignty" on the "imperative" theory of law.... I rest it on the need for "a single authoritative source of formulation".'[1] The core of Bodin's conception (which he will call the 'juristic conception') is, he says, that logically there must be a last word somewhere. But one wonders if even in this respect 'the life of the law' has been 'merely logic'. You remember the experience of King Canute with the waves. There you had a single source of formulation. Of what use was that? The crux is that the source must indeed be *authoritative*—and Austin's point is that authority is merely the reflex of habitual obedience, that in default of this all is vanity, and that to have grasped this is enough for the law student in his first term. There is not much point in being captain unless the other fellows want to play.

The most interesting of all the distinctions, to my mind, is not that between political and legal sovereignty but that between 'logically pre-constitutional theory' and the unornamented truth. Austin to-day would watch with interest the experiments in Italy and Russia. Where, he might be led to say, the bulk of the people pay habitual obedience to X, while X allows them to do it under the forms of a constitution which assumes that they are paying habitual obedience to Y—then it may for some purposes be of interest to look behind the form at the substance. But this is merely the same as pointing out that a king's favourite may be known to have great influence, or that it is often the secretary of a supine committee whose will prevails. As the committee is deemed in such cases to 'decide', so, in my construction of constitutional processes, the sovereign one or number is deemed to command.

After all Austin's was hardly a novel point of view. So long as in Rome the bulk of the community paid 'habitual obedience' to a Princeps who nominally derived his authority from the Populus Romanus, Austin's 'construction'

[1] *Political Science Quarterly*, xlii, p. 525.

of the situation must have been the same as that of the Roman jurists themselves, namely, that sovereignty (in his sense, and incidentally also in theirs) lay not with the Princeps but with the people. As a way of construing the facts this should only seem to you specious if you disregard the forms observed: and the observance of a form is itself also a relevant fact—even though the theory underlying the form be what Sidgwick and others would perhaps have been careful to style a fiction.

Discussing, in a charming passage, the China of yesterday, a recent writer says, 'Theoretically China's form of government was an absolute monarchy. Actually it was a locally autonomous democracy. Theoretically the Emperor wielded autocratic power. Actually the Chinese people enjoyed self-government to a degree seldom if ever attained by any other people not primitive.' This, like the example of the Roman Principate, is an extreme case—where, as there, we see what a difference there may be between construing the fact of submission along with the constitutional forms observed, and, finding words for the feeling of obedient masses as to who it is that they are obeying. In English contract law, if a man says one thing, and means another thing, he is usually deemed to have meant what he said. He is not, that is, deemed to have said what he meant. It is the difference between the extrinsic and the intrinsic modes of interpretation.

Observe the contrast. In one case—China—the authority rooted at the circumference is deemed to have oozed out from the centre. In the other, the authority based upon an army at the centre is deemed to have flowed in from the circumference.

'Much confusion', says Professor Dickinson, referring to Bryce and Dicey, 'has been created by using the word "sovereignty" to designate the practical leverage which the electorate . . . has over an elective legislative organ.[1]. . .' You will realize that Austin had no hand in starting this hare. In the later Principate, the Roman Populus had

[1] *Political Science Quarterly*, xlii, p. 532.

little or no practical leverage over the Princeps—but it remained true to say that the bulk of the community tolerated a system by the orthodox theory of which authority was exercised in the name of the Roman people—or, to be more exact, S.P.Q.R. And what Austin construes is the total situation of social fact, including the orthodox theory—and he is simple enough to suppose that for his clue to the orthodox theory he need look no farther than to the constitution. Professor Dickinson notices that 'sovereignty' and all the problems which the word connotes for us were 'conspicuously absent from the political speculations of classical antiquity'. So far as Rome is concerned the reason I think is because everybody took for granted the Austinian view. As Sir Maurice Amos reminded us, 'the things which in common we take for granted are the foundation of our social life'. In Rome, while Rome mattered, it was commonplace that law embodied the will of that collectivity, that sovereign number, the Roman people. As the Republic gradually evolved into an Empire, it became increasingly artificial (if you like that word) to construe the situation in terms of the inherited republican forms rather than the ubiquitous imperial facts. So it was only because the Romans were not much given to political speculation and had thus not developed a sensitivity to the 'artificial', that with them the problem of sovereignty remained so conspicuously absent.

But, whereas I have gladly done my best to defend Austin's conception of the ultimate relation between law and public opinion, wherein he was so near to the Romans, we do not reach the heart of his notion of law until we come to his definition of obligation, in which he is closer to some of the French, and which I am not so ready to defend. So far as any credit is due to him here, it is not so much for the way he answers the question as to the nature of legal obligation as for having recognized that so elementary a question was in need of any answer at all. The inherent rightness of the rule, the direct appeal to reason and

conscience, could not serve, for it surely is not this that we refer to when we say that law is binding even on the exceptionally anti-social individual in the moment of exceptional temptation.

Broadly, Austin's version of the matter is that every prescription or prohibition, every command, is sustained by its own obligation, this consisting in the influence exerted upon a person's desires by the possibility, however slight, of incurring the evil consequences threatened to be annexed to his possible disobedience. Notice how essentially *de facto* the thing becomes.

Duguit, we were told, wanted to build a state concept that was 'free of fictions, untrammelled by metaphysical hypotheses. It was to be realistic and positive . . . and limited by the most rigorous scientific scrutiny that the jurist can attain'.

Under the influence it seems of Hobbes and Bentham, reinforced by the inspiration of Dr. Brown, Austin appears to have set out with a similar idea. Like Duguit he aspired to put the law on a strictly *de facto* basis . . . and in each case this noble ambition was the sin by which the angel fell. To keep strictly to facts is certainly an excellent rule—provided you give heed to all the relevant facts. Both of them appear to miss what seems to me the central and most vital fact of all, namely that, fundamentally, law is not a fact, but an idea. For, surely, when *ius* dissolved its immemorial partnership with *fas*, it will not *eo ipso* have ceased to be a body of doctrine. Austin, however, like Bentham, is unwilling to allow jurists, or psychologists, to introduce 'fictitious entities' of their own.[1] The scientist, he holds, must *find* his data; he must not improvise them.[2] Perhaps because he is a lawyer he does not comfortably accept the thought that his professional stock-in-trade is a mere collection of 'fictitious entities', and, while Bentham seems to have allowed the possibility of an 'ideal object',

[1] 'Factitious', yes, but not 'fictitious'.

[2] Cf. some of his remarks on the alleged 'occult property' known as status.

which was not actually a 'fictitious entity', this subtle distinction does not occur in Austin. So, just as you can imagine Duguit saying, 'If the British Government is anything more than a mere collection of men, then my eyes are deceiving me', so Austin seems to me to say, 'If a legal obligation could not be described in terms of elementary psychology, it could not be real at all, which would be absurd.'

Thus, while his instinct in excluding from jurisprudence any discussion of what men ought to do, and why, may have been sound enough, it led him into such a superficial analysis of the idea of legal obligation as the Romans could hardly have entertained for a moment.

Bentham does not—or does not consistently—conceive of law as a body of doctrine. The Romans, I think, do: though they are not sufficiently interested in law *qua* social phenomenon to arrive at any perfect statement of exactly how they do conceive of it. Austin admired greatly the Romans, as jurists—and the Germans also. But he was too much under the influence of Bentham's pseudo-realistic mystery-dispelling analytical technique ever to accept, or apparently even to comprehend, the definition of obligation as a *vinculum iuris*. The Romans had not caught him young enough. Steeped early in Hobbes and Bentham, he came to the study of law with disabilities analogous to those of a fundamentalist reading, let us say, for a degree in geology (or is it the other way about?). This, I suggest, is why he was capable of completely misunderstanding Blackstone, who, whatever his limitations in other respects, was, after all, a fairly competent lawyer.[1]

If you can forgive a little play upon words we may say that, as between existence *simpliciter* and out-and-out non-existence, Austin does not seem to conceive the possibility of a *tertium quid*, to wit the possibility of an existence *secundum quid*. And yet it is only so, that is to say, in a certain qualified sense, that law can strictly be said to exist at all.

[1] *A.J.* ii, p. 526.

Hence, though retaining the Latin metaphor 'obligation', Austin does not adopt the roughly equivalent English expression 'artificial chain'.[1] Keeping strictly, as he supposes, to the facts, he describes obligation in terms of its sanction. International statesmen to-day, in insisting that obligations rest on signatures, do not admit that sanctions are unnecessary: far from it; but they see that the existence of the obligation is one matter, its possible enforcement another. They would not define obligation in terms of crude psychology—like Austin. It is a question, as the Romans realized, for *La Doctrine*, i.e. *Ius*—to be answered by a *Iuris Prudens*.

Although this is not ostensibly a series on Modern Tendencies in Jurisprudence it will be in conformity with the example set in some of the earlier lectures if I here say a further word about the nature of jurisprudence as 'professed' by Austin, at least in so far as this may tend further to advertise his ideas on the nature of law.

If, keeping in mind the definition of positive law as the command of the sovereign, we return to Austin's own opening statement of the business of jurisprudence, we are likely to be struck at once by the impossibility of reconciling the two. How, except by the purest accident, can we expect to find 'general principles . . . *common* to the ampler and maturer systems of positive law'? A jurisprudence professedly committed to the study of such principles seems to start from an assumption inconsistent with the notion of law as having its content controllable at the sovereign's unrestricted pleasure. Austin seems to admit the difficulty, but does not convincingly meet it, when he says, 'All systems of law have a common foundation in the common nature of mankind; but the principles which pervade them all are fashioned and obscured in each by its individual peculiarities.' He is on this account effectively

[1] Hobbes, on this point, seems inconsistent. In one place he apparently identifies obligation with the event which gives it birth. Elsewhere, however, he speaks of obligations as 'artificial chains due to fear'.

taken to task, in an article published in 1890, by Professor (at that time Mr. W. W.) Buckland.[1]

My own suspicion is that Austin had borrowed his description of the scope of jurisprudence from some German context in which it was less of a misfit. Be that as it may, we should at all events not exaggerate the practical influence of this formula upon his teaching. In his comparative treatment of Roman and English legal ideas, he does tend, it is true, to assume that they will prove on examination to be like one another, but he is just as capable of dwelling on a difference as on a point of similarity, and, since his main anxiety is merely that the student shall be enabled to grasp clearly and accurately the relevant concepts in either case, the apparent non-success of his search for uniformities does not affect the real utility of the search. (He may make some mistakes of detail, but then, after all, he never was much more than a novice at his job.)

Having already noticed his vagueness as to the distinction between truth and doctrine, I have not far to look for a possible explanation of his curious formula. The assumption about *common* 'general principles, notions, and distinctions' rests, I conjecture, on a confusion, which seems more excusable in him when found surviving full of life in Mill's well-known article in 1863, and even in some writers of much more recent date. Though the dividing line may in places be difficult to draw, I think it is not hard to conceive the distinction between two sorts of lawyerly thinking, namely, legal thinking proper (in terms, so to say, of the law's *own* ideas) and thinking in regard to law (in terms of what are merely ideas of the jurist). In particular places it is, as I say, difficult and, happily, not important to make out the exact position of the line; and possibly there will occur to you some especially familiar, although technical, notion, such as crime, or obligation, which with appropriately differing definitions will appear to be equally at home on both sides of the border. Take, for example, the English notion of a tort. The common law is cognisant of

[1] *Law Quarterly Review*, vi, p. 436.

trespass, of conversion, of libel. The law, as it stands, could, I submit, scarcely get along without these. But about the notion of tort I am not quite so sure. The English jurist, in a scientific spirit, perceiving certain common characteristics, subsumes the three specific notions under the generic heading of tort. I have purposely selected a difficult example: and it may be that you are not satisfied that the law as it stands could think clearly about its detailed categories without going in for a certain element of scientific generality. You may consider that the idea of tort is primarily a legal and only secondarily what I will call a juristic idea. It certainly is very near to the border; and at this moment all I care about is to insist that the primarily legal, and the primarily juristic, are theoretically distinguishable fields of lawyerly thinking. If we turn from discussing notions to discussing generalizations the distinction between the fields should surely be patent enough. Valid propositions *of* law, however general, are one thing. Sound generalizations *about* law, I submit, are another.

There is a good deal more to be said on this distinction between technically legal thinking, and merely juristic thinking about law. The former is always, essentially, and necessarily, doctrinal: the latter may be in terms of fact or it too may be doctrinal, but if doctrinal it is in terms not of legal but of some sort of extra-legal doctrine—of political doctrine, for example. That a simple contract requires 'consideration' is, I take it, a proposition of law. That law rests upon the will of the people, is, I suggest, a proposition of political doctrine. And, finally, when I say that law is in essence a body of doctrine I put it forward as a proposition of objectively apprehensible fact.

There are notions and distinctions, and there are generalizations, to be found both in the juristic and in the technically legal fields of thought. It is, however, worth while to notice that in practice Austin works not as either an English lawyer or a Roman lawyer trying to clear up difficult points of law (indeed it is only very rarely that he cites by name an English case) but as a jurist extracting

what he can of more or less tentative generalization *about* his subject-matter. What, he asks himself, can be soundly said about titles in general? About codification in general?[1] Not very much, he confessedly finds. But here and there he becomes as sweeping, and, I fear, as presumptuous, as Maine in certain of his best remembered dicta. 'Accordingly,' says Austin, after a comparison of the Roman and the English rules on the point, 'inevitable ignorance or error in respect to matter of fact is considered, in every [*sic*] system, as a ground of exemption.'[2] The inquiry at all events is full of instruction and zest.

Had Austin perceived the ambiguity which I consider to have been latent in his words he would, I believe, have admitted the logical force of Professor Buckland's criticism, and contented himself with a programme of searching for 'juristic' as distinct from 'purely legal' generalizations. Owing to the common nature of mankind, he would claim, we may expect to find at any rate a certain number of notions, distinctions, and generalizations congenial to a discussion *about* positive law in general. This you will remember is one of the main contentions in Professor C. K Allen's 'Jurisprudence: What? and Why?'[3]

Passing now to more familiar ground, it remains for me to mention, though everybody knows it, that Austin is classed as a member of the so-called Analytical School. Perhaps partly because both names begin with an A you will find, indeed, that in many minds, he and it are so closely associated that each must take a share of any disfavour incurred by the other. Thus on the one hand it is commonly forgotten that Austin in any way recognized the value of historical jurisprudence: and on the other hand it seems widely supposed that analytical jurisprudence must necessarily lead to that imperative theory of law from which Austin began. It therefore seems proper that an attempt should be made to view Austin's method in relation to those of certain other jurists.

[1] *A.J.* ii, p. 666. [2] *A.J.* i, p. 481. [3] *Legal Duties*, p. 9.

In Berlin, I am told, if you go there to study music, the professor will begin by informing you that 'Die Musik ist eine Kunst . . .', and so on. That is, before they teach you music they teach you *about* music. Now Maine and Austin were alike, and were different from, say, Blackstone and Dicey, in that they were jurists rather than lawyers, so that their interest in the teaching *of* law was as it were subordinate to their interest in teaching *about* law. While Maine, however, attacked social science in its widest extension, and taught about law only as incidental to teaching about mankind, Austin saw it as his special function to furnish what would serve to fertilize the professional cabbage-patch of the law-student. The major difference between them related, however, not to the scope of their teaching but to the method.

Law, needless to say, is a social institution. Like any other social institution it evolves, but on the whole rather slowly—so slowly that Maine, you will remember, applied to it the simile of the glacier. Still, in teaching about the glacier, he chiefly dwelt upon the fact that it was moving and the way in which it moved. Austin, while far from denying the movement, spent all his moments in dissecting its particular features, much in the same way as he might have done had it been standing still.

Some of us have lately seen a moving picture of the Derby. That film of course is just a series of connected pictures, any one of which, studied by itself, suggests an illusion of fixity snatched by photographic magic from a world of movement, thereby enabling us to make out how matters 'stood' in the race at some particular stage. Being thrown in quick succession on the screen that series of pictures results in a compensating illusion, an impression of continuity, one and the same pictorial horse seeming to gallop alive across the field of vision. Here, I suggest, we see the relation between historical and analytical jurisprudence. As the truthfulness of the moving picture of a moving world depends upon the quality of the instantaneous photograph, so must sound historical jurisprudence,

though dealing with evolving law, pre-suppose reliable evidence as to how that law 'stood' at any given time. Analytical jurisprudence aims at providing a clear if static picture.

Nor is it without importance to notice that even should the glacier break into a gallop, the doctrine which any court of justice will have in practice to discover and apply will always be the law as it must be held to have 'stood' at some particular time. The individual snapshot, if insufficient, is at any rate indispensable. Neither Austin nor Maine would, I think, have admitted that there was any conflict between analytical and historical jurisprudence.

How then about modern sociological jurisprudence? Is there any essential conflict here?

You will realize, of course, that not every use of the ordinary English word 'analytical' has any intended reference to the type of jurisprudence taught by Austin. Professor Laski, for instance, has lately pleaded for a 'more functional' and 'less analytical' method of statutory interpretation.[1] I feel sure he is here referring, not particularly to the authentic tradition of the so-called 'analytical' school, but rather to the de-humanized 'jurisprudence of conceptions'.

However, as Sir Maurice Amos reminded us, there does in some quarters exist a tendency to speak of the 'jurisprudence of conceptions' as 'a type of legal reasoning closely allied to that of the analytical school'. I myself can find in Austin's work no ground for inferring that he would have been an enemy of the 'more functional' tendency of which we have lately been hearing. Only I think he would had urged that even the most progressive sociological jurisprudence should start from the sharp instantaneous picture. No one more than he would have liked to see the judges permitted, and trained, to exercise a very considerable quasi-legislative discretion.[2] But I fancy he would have borne in mind that, deprived of an absolute

[1] *Report of Committee on Ministers' Powers*, Cmd. 4060, p. 137.
[2] *A.J.* ii, p. 533.

standard of reference, the very notion of relativity itself comes not to mean much.

May I to reinforce this point caricature very crudely what I gather is rather the position of the sociological school? It is, I suggest, somewhat as if a mathematics professor, concerned about his country's bridges, were to start his lectures thus: 'Mathematics, you should know, embraces sundry elements, the chief of which are arithmetic, geometry, metallurgy, architecture, and town-planning. We mathematicians are here to form the advance guard in the march of creative engineering. The time has gone by when under Austin's influence it was supposed that mathematics could properly concern itself with numbers and with space-relationships, conceived in abstraction from those "other things" which never in real life *are* "equal". The mathematician is a citizen of a changing world, and, not even in the presence of his first-year students can the professor put aside his portion of responsibility for the shaping of to-morrow's changes.'

An unfair picture, perhaps, for it implicitly begs, as it were, in Austin's favour the question as to what matters are properly to be understood as coming within the notion of law. One ought not to forget Humpty-Dumpty.

Mr. Ramsay MacDonald recently said of the journalists at an international conference that their activity, unlike that of mere seismographs, whose only function it was to *register* earthquakes, extended further, so as to include the creating of earthquakes at the same time. Austin, while he might have wanted the judge to play the statesman, and be trained for it, would not I think have wished the law-professor to blur the line between jurisprudence, in, if you like, the narrow sense, and the philosophy of judicial legislation.

You will remember Dr. Lauterpacht's passage about the sciences of 'the soul without the soul' and 'the state without the state'. You may have noticed that he did not canvass the possibility of a science of the law 'without the law'. One of the 'lesser breeds' of science I imagine Kipling would call it.

However far the judge may by constitutional practice be authorized to go in his social engineering, the notion of law, I submit, should continue to serve him as a datum line and not simply as a screen. Otherwise we may find mere human justice being administered in so-called courts of law, in the same way as law without justice may have sometimes prevailed merely because administered in so-called courts of justice.

It is precisely because jurisprudence cannot be finally segregated from the other social sciences that it seems to me propitious to begin it in an analytical way.

'If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discover the true basis for prophecy. Therefore it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent and negligence, by ownership, by possession, and so forth. I have in mind cases in which the highest courts seem to have floundered because they had not clear ideas on some of these themes.'[1]

This particular quotation is not of course from Austin, but from Mr. Justice Holmes; but I really do not see that that matters.

However, as Professor Hearnshaw is careful to point out, Austin, in what he had hoped would be his life-work, proved a failure. Nowadays we pick holes in his definition of law, but you will note that at that time he failed not because flaws were discerned in his political theory but because the London law-student felt no need for his jurisprudence. In some continental universities the subject had an unquestioned place, but in England a sort of voluntary boycott had been in operation against it. Austin set up a jurisprudence-factory on British soil, to exploit foreign technique; but found no market for the stuff. It was partly, of course, a matter of 'get-up'.

In those days the professor's salary was found directly out of the fees collected from his students.[2] In a system

[1] *Harvard Law Review*, x, pp. 474–5.

[2] *A.J.* i, p. 9.

which supports only those scientists for whose output there continues to be an effective demand there is no doubt a certain rough economic justice; but, in the course of that sort of justice, my colleagues will certainly not resent my putting it to them—Which of us should see salvation?

Austin's work, then, however we may judge it to-day, was not at the time rejected as inherently unsound. We can only wonder how he would have answered his detractors had he lived to hear them. In the long interval between his retirement and his death, two voices only, so far as I have been able to learn, were raised in criticism of his work. One was Austin's own. He declared that 'the book must be entirely recast and rewritten, and that there must be at least another volume.'[1] The other critic was Lord Melbourne, who complained that the book was not sufficiently interesting.

What was it in essence that Austin had been trying, in his lectures, to do? For reasons at which I have already offered a guess his own answer to this question was confused; but I think his objectives included the one advocated by Professor Buckland in the article I have already referred to, namely, a more consciously directed attention to the specifically theoretical element in law. The task *par excellence* of legal education is, I take it, to impart the ability to view situations of fact through 'the eye of the law'. The eye of the law is not of quite the same sort as the eye of the man in the street. It is more like the eye of a man on the top of a very tall building which, as Lord Coke appreciated, it took him years to climb. Austin's idea was to facilitate the ascent. 'A crammer?' you may say. No: I think the crammer is rather the man who stands in the street selling pictures of the view from the top of the building. What Austin did was to install, for the first part of the way, what he thought was a lift: but its outward appearance was so unprepossessing that the young men continued to follow Lord Coke and Company up the

[1] *A.J.* i, p. 16.

well-worn stairs. 'Little came of it all', writes Maitland, almost as if with a sigh of relief.[1]

At bottom the question was, and is, What brand or brands of jurisprudence, if any, need to be taught to law-students, and, in particular, to beginners? It may be that the full meaning, say, of religion, cannot be understood without a knowledge of life, but this is not held to render unsuitable the starting of religious instruction in the nursery. Is the suggested analogy wholly unsound?

It would of course be possible, though I will not say magnanimous, for persons of consequence to reason as follows. In a country where the Bench is recruited from among the more successful, sometimes even the most successful, of the practising members of the Bar, and where a hard head and a strong character are appreciated in a judge, there may be no particular point in artificially smoothing the path to success in that profession. Throw the little ones into the river and let them learn to swim!

One would gladly have given even more space to matters subsidiary to the main topic of this lecture. There is so much which is penetrating and suggestive in Austin apart from his endorsement and elaboration of the Imperative Theory: yet presumably it is with this last that his name will continue to be principally linked.

It is a mistake, though a most natural one, to think that Austin's position is easy to comprehend. No subtle position is easy to comprehend: and if, besides being subtle, it is confused, the difficulty is correspondingly greater. While agreeing, however, with Professor Hearnshaw that Austin's mind was 'mole-like'[2] (a merit, in my view), I respectfully protest against his saying that it was 'muddled'. Considering his circumstances and the materials with which he worked, I do not on the whole consider Austin's position to have been surprisingly inadequate. What he seems to have so meritoriously borne in mind was that no account

[1] *Encyclopaedia Britannica*, 11th ed., article on English Law.

[2] *Social and Political Ideas of the Age of Reaction and Reconstruction*, p. 169.

of human institutions could properly be styled scientific which had not its bases in the most plausible findings in his day available in the field of human psychology. He accepted—but who can blame him?—what appeared to him the soundest expert analysis then to be had of the nature of law-respecting conduct in the marginal case.

At the same time Austin accepted—but many writers still do—the hoary assumption that law is a mere aggregation of rules.

Finally, being a lawyer, or preferably, in spite of being a lawyer, he assumed that law and legal entities had somehow a *de facto* existence. Had he only laid bare the distinction between law and fact as plainly as he did that between law and morals, we might have been spared a deal of wordy but inconclusive writing these hundred years.

Nevertheless his presentation of the Benthamite view was hardly such as to justify some of the loose terms in which you will still find it referred to. Listen. 'Austin was by nature, experience, and training an absolutist in government and law.'[1] Apart from the fact that his 'number' is by no means necessarily a small one, Austin is in any case very far from suggesting the essential irresponsibility of the sovereign: on the contrary he explains that 'superiority' and 'inferiority' are 'reciprocal', so that in one sense the sovereign is the 'inferior' of the community;[2] only you will see that, the relation being pre-legal, his sovereign is not in any *technical* sense responsible; any more than a member of Parliament is to his constituents.

Nor does he make any assumption as to the worthiness of his sovereign one, or number, to continue enjoying the people's obedience. He simply notes, or, if you like, postulates, that obedience as a fact. That the people do not rebel is of course no more a proof that government is good than the forbearance of its customers to make a run upon a bank is a safe sign that the bank is solvent. Austin, as I understand him, was fully aware of this: indeed he puts the rational case for exceptional resistance to established

[1] *Political Theories in Recent Times*, p. 146. [2] *A.J.* i, p. 97.

rule, if not as cogently as some of our present-day writers, then at least with a very fair exercise of intelligent anticipation.[1]

What seems to me, however, to estop us, as it were, from speaking slightingly of Austin to-day is, not any supposed perfection in the results of his efforts, but our own comparative failure to put anything more satisfactory in their place. Many of us still talk as if the type of analysis to which he submitted the notion of status was substantially sound. We still quite commonly speak of ownership as if it were a bundle of rights, of sovereignty as if it were an aggregation of powers. Life, of course, has similarly been described as merely a series of opportunities—just one thing after another.

The offence which, in our enlightened age, has perhaps been most resented in Austin is his assertion that 'international law . . . is not positive law at all but only positive morality'.[2] In this connexion it is not usually mentioned that, while consistently excluding it from the category of *positive* law as defined by him, Austin nevertheless does seem in the end to have classed international law with 'law properly so called',[3] and does from the beginning put it on a level with 'constitutional law'; which, except in so far as it consists of commands of the sovereign, is not, with him, an example of 'positive law' either.[4]

We need not assume that were he living now Austin's views would even in the international field be found a bar to progress. After all, the core of his position was that without authority it was not possible for law to stand. And it is precisely the decay in the authority of law that is bound to be so discouraging to any who still look to the ultimate building up of a more rationally integrated world order. While Austin might have fewer illusions than some of us as to the limits of law's possibilities as a controlling

[1] *A.J.* i, p. 118. [2] *A.J.* ii, p. 754.
[3] See *The Province*, 2nd ed., footnotes on pp. xlv, 17, and 112.
[4] *A.J.* ii, p. 746.

influence in international relations, he would see little, I think, in the contemporary world to weaken his belief that a wide-spread predisposition to submit to the rules of the game was for any community a priceless inheritance.[1] It was because he preferred that this habit should rest rather on intelligence and insight than on ignorance and inertia that he so ardently stood (a century ago) for universal education, more particularly in the social sciences; and deemed himself so happy in being called upon to play, in that needed process of education, a small but honourable part.

'It cannot be too deeply regretted,' wrote Mill, 'that, through the combined effects of frequently-recurring attacks of depressing illness and feelings of discouragement. . . . Mr. Austin did not complete his Lectures in the form of a systematic treatise.' '. . . he would have attracted to the study of the subject every young student of law who had a soul above that of a mere trader in legal learning; and many non-professional students of social and political philosophy (a class now numerous and eager for an instruction which unhappily for the most part does not yet exist) would have been delighted to acquire that insight into the rationale of all legal systems without which the scientific study of politics can scarcely be pursued with profit . . . since juristical ideas meet, and, if ill understood, confuse, the student at every turning and winding in that intricate subject.'[2]

There is no necessity for his admirers to seek to read into Austin's words an appreciation of every distinction which may now seem plain to us. He found his subject in an encircling gloom; but discovered in Hobbes, and partly also in Locke, a technique, a kindly light, for working towards the day. Some of his most illuminating phrases are secreted, as it were, in the interstices of his general argument: so that it is an advantage, when re-reading him, not to trouble about his conclusions but simply to watch his cautious, nicely-tempered mind at work. Maine, indeed,

[1] Cf. Sir Arthur Salter: 'Half the art of government, let us never forget, consists in the luck of having amenable subjects.' *Recovery*, p. 56.
[2] *Dissertations and Discussions*, vol. iii, p. 269.

in advising a study of Austin's 'conclusions',[1] seems to me to have slightly missed the mark. If Austin has lessons for us we shall find them I think not in his conclusions—which are inevitably as fallible as certain of his premises—but in his method and the spirit in which he practised it.

There would seem to be room to-day for workers of Austin's stamp in a number of fields: in municipal jurisprudence, international jurisprudence, political philosophy, and in the social sciences generally. His own scientific interests were by no means confined to jurisprudence. Regarding a department of inquiry which he called 'ethics', but which we should perhaps call 'social engineering' he had some particularly significant things to say. Of himself he is quoted as complaining that he had been born out of due time. In view of the fact that, when he was young, neither Sir Ernest Cassel nor Mr. John D. Rockefeller, Senior, had as yet been even thought of, I suppose we can only concur.

[1] *Early History of Institutions*, p. 343.

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